

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

74-1787

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1787

FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

v.

RUSSELL E. TRAIN,

Respondent.

On Petition For Review Of Action Of
The Administrator Of The
Environmental Protection Agency

BRIEF FOR PETITIONER

ROBERT C. BARNARD
DANIEL B. SILVER
JOHN D. FIELD, III
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

ATTORNEYS FOR PETITIONERS

OF COUNSEL:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

October 2, 1974

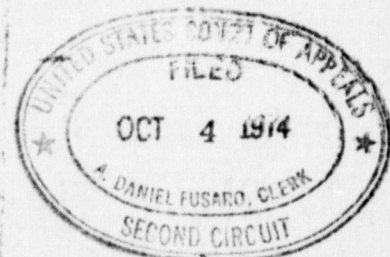


TABLE OF CONTENTS

Authorities Cited	iii
Preliminary Statement	1
The Parties	2
Questions Presented	2
Statutes and Regulations Involved	3
Jurisdiction	3
Statement of the Case	6
The Administrative Proceedings	6
The Statutory Framework	6
Summary of Argument	17
ARGUMENT	18
I. THIS COURT DOES NOT HAVE JURISDICTION UNDER THE PROVISIONS OF SECTION 509 OR ANY OTHER STATUTE TO REVIEW THE EFFLUENT GUIDELINE REGULATIONS	18
A. Review Under Section 509 Is Limited To Actions Taken Under Specified Sections Of The Act And Does Not Include Actions Under Section 304(b)	19
B. EPA's Recently Adopted Claim That The Regulations Also Constitute Effluent Limitations Under Section 301 Contravenes The Administrative Procedure Act	24
1. The regulations establishing effluent guidelines were, as required by the Act, promulgated under Section 304(b)	24
2. It is too late under the Administrative Procedure Act for EPA to claim that the regulations constitute effluent limi- tations under Section 301	32

C.	The Act Does Not Contemplate Or Authorize Effluent Limitations Prescribed By Regulation ...	33
D.	EPA's Contention That It Has Authority To Issue Regulations Under Section 301 Establishing Limitations Is Based on a Construction Which Would Create By Implication A Massive New Criminal Code	45
II.	THE REGULATIONS ESTABLISHING EFFLUENT GUIDELINES DO NOT COMPLY WITH THE STATUTORY REQUIREMENTS	49
A.	EPA Has Failed To Specify Factors Relevant To The Actual Application Of Technology As Required By Section 304(b)	49
B.	EPA's Approach To Establishing Industry Classes and Categories Was Improper	55
C.	In Formulating The 1977 Guidelines, EPA Improperly Identified Effluent Reduction Based Upon A Nonexistent "Model" Plant	59
D.	The 1983 Guidelines Are Not Based On "Best Available" Technology Within The Meaning Of The Act	64
III.	THE JUDICIAL REVIEW ROLE OF THE COURTS	67
	CONCLUSION	69
<u>Addenda</u>		
A.	Pertinent Provisions of the Federal Water Pollution Control Act, as amended	A-1
B.	Opinion and Order of September 27, 1974, <u>E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al.</u> , Civil Action No. 74-57 (W.D.Va.)	B-1
C.	Opinion and Order of September 18, 1974, <u>American Paper Institute v. Russell E. Train, et al.</u> , Civil Action No. 74-814 (D.D.C.)	C-1
D.	Tabulation of EPA Actions Not Subject to Judicial Review Under Section 509(b)	D-1

E. Environmental Protection Agency Memorandum on Judicial Review of Effluent Guidelines Limitations (February 25, 1974)	E-1
---	-----

AUTHORITIES CITED

CASES:

<u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136 (1967)	23
<u>Toussie v. United States</u> , 397 U.S. 112 (1970).....	48
<u>Dry Color Mfrs. Ass'n, Inc. v. Department of Labor</u> , 486 F.2d (3d Cir. 1973)	69
<u>Environmental Defense Fund v. Hardin</u> , 428 F.2d 1093 (D.C. Cir. 1970)	68
<u>E. I. du Pont de Nemours & Company v. Train</u> , No. 74-1261 (4th Cir.)	4
<u>Greene County Planning Board v. Federal Power Commission</u> , 455 F.2d 412 (3d Cir.), <u>cert denied</u> , 409 U.S. 849 (1972)	36
<u>Hooker Chemicals and Plastics Corporation, et al. v. Train</u> , No. 74-1683 (2d Cir.)	4
<u>Kennecott Copper Corp. v. EPA</u> , 462 F.2d 846 (D.C. Cir. 1972)	69
<u>Natural Resources Defense Council, Inc. v. EPA</u> , No. 74-1258 (2d Cir.)	4, 29, 46
<u>Natural Resources Defense Council, Inc. v. Train</u> , No. 74-1433 (D.C. Cir.)	29, 30, 31
<u>Peoples v. United States Department of Agriculture</u> , 427 F.2d 561 (D.C. Cir. 1970)	19
<u>Portland Cement Ass'n v. Ruckelshaus</u> , 486 F.2d 375 (D.C. Cir. 1973)	68
<u>United States v. Jefferson County Board of Education</u> , 372 F.2d 836 (5th Cir. 1966), <u>cert. denied</u> , 389 U.S. 840 (1967)	36

<u>Wagner Electric Corp. v. Volpe</u> , 466 F.2d 1013 (3d Cir. 1972)	33
<u>American Paper Institute v. Russell E. Train, et al.</u> , Civil No. 74-814 (D.D.C. Sept. 18, 1974)	5, 19, 27
<u>E.I. du Pont de Nemours & Company, et al. v. Train, et al.</u> , Civil Action No. 74-57 (W.D. Va. Sept. 27, 1974)	5, 19, 27, 31-33, 35, 39, 47, 53
<u>Goodyear Tire & Rubber Company, et al. v. Train</u> , Civil Action No. HM-74-1057 (D. Md.)	4
<u>Natural Resources Defense Council, Inc. v. Train</u> , 6 E.R.C. 1033 (D.D.C. 1973)	25
<u>Pharmaceutical Mfrs. Assn. v. Finch</u> , 307 F. Supp. 858 (D. Del. 1970)	33

STATUTES:

Administrative Procedure Act

§ 4, 5 U.S.C. § 553	33
§ 10, 5 U.S.C. §§ 701-705	4, 19
§ 10(e), 5 U.S.C. § 706	4, 19, 67

Federal Water Pollution Control Act

§ 101, 33 U.S.C. § 1251	7
§ 301, 33 U.S.C. § 1311	<u>passim</u>
§ 302, 33 U.S.C. § 1312	3, 20, 41, 44
§ 304, 33 U.S.C. § 1314	<u>passim</u>
§ 306, 33 U.S.C. § 1316	3, 19, 20, 25, 27, 28, 41, 43, 44
§ 307, 33 U.S.C. § 1317	3, 8, 21, 25, 28, 34, 35, 44
§ 308, 33 U.S.C. § 1318	44
§ 309, 33 U.S.C. § 1319	3, 22, 43, 44, 45

§ 402, 33 U.S.C. § 1342	7, 8, 13, 15, 16, 20, 35, 37, 39, 41, 42, 44, 56
§ 502, 33 U.S.C. § 1362	10, 40, 42
§ 505, 33 U.S.C. § 1365	3, 22, 40
§ 509, 33 U.S.C. § 1369	3, 4, 5, 17, 18, 19, 20, 21, 39, 40, 41, 42, 43, 44, 45
Pub. L. No. 93-207, 86 Stat. 906 (1973)	20

Judicial Code

28 U.S.C. § 1331	4
28 U.S.C. § 1332	4
28 U.S.C. § 1337	4
28 U.S.C. § 1361	4, 19
28 U.S.C. § 1651	4

National Environmental Policy Act

42 U.S.C. § 4332 (2) (C)	36
--------------------------------	----

FEDERAL REGISTER NOTICES

39 Fed. Reg. 33470 (September 17, 1974)	33
39 Fed. Reg. 28926-27 (August 2, 1974)	55
39 Fed. Reg. 26423 (July 19, 1974)	3, 6
39 Fed. Reg. 26061 (July 16, 1974)	38
39 Fed. Reg. 6659 (February 21, 1974)	3, 6
39 Fed. Reg. 6660 (February 21, 1974)	27
39 Fed. Reg. 6661 (February 21, 1974)	54, 59
38 Fed. Reg. 28220 (October 11, 1973)	26
38 Fed. Reg. 28219 (October 11, 1973)	6
38 Fed. Reg. 21206 (August 6, 1973)	26
38 Fed. Reg. 21203 (August 6, 1973)	26
38 Fed. Reg. 21202 (August 6, 1973)	4, 6, 25, 26

CODE OF FEDERAL REGULATIONS

40 C.F.R. Part 1500, 38 Fed. Reg. 20550 (August 1, 1973)	36
40 C.F.R. § 401.11, 39 Fed. Reg. 4532 (February 4, 1974)	27
40 C.F.R. § 415.21-.23, 39 Fed. Reg. 9634 (March 12, 1974)	5
40 C.F.R. § 428.12, 39 Fed. Reg. 6662-63 (February 21, 1974)	54
40 C.F.R. § 428.13, 39 Fed. Reg. 6663 (February 21, 1974)	54
40 C.F.R. §§ 430.10-.56, 39 Fed. Reg. 18742-52 (May 29, 1974)	5

MISCELLANEOUS

H. R. Rep. No. 93-680, 93d Cong., 1st Sess. (1973)	21
Senate Committee on Public Works, <u>A</u> <u>Legislative History of the Water Pollution</u> <u>Control Act Amendments of 1972</u> , 93d Cong., 1st Sess. (Committee Print 1973) (<u>Legislative</u> <u>History</u>)	14, 15, 16, 37, 42, 51, 61, 64, 66

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1787

FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

v.

RUSSELL E. TRAIN,

Respondent.

BRIEF FOR PETITIONER

Preliminary Statement

This is an action^{1/} to review and set aside regulations establishing effluent guidelines for the Tire and Inner Tube Plants Subcategory of the rubber processing industry issued on February 21, 1974 (39 Fed. Reg. 6660) by the Environmental Protection Agency

^{1/} A petition challenging the same guidelines has also been filed in this Court by the Goodyear Tire & Rubber Company, et al., No. 74-1809. Petitioners in both proceedings assert the same grounds on which (1) the Court should hold that it does not have jurisdiction to review the effluent guidelines or (2) if it does hold that it has jurisdiction the Court should set aside and remand the challenged guidelines. The Court is respectfully referred to the brief in No. 74-1809 for Petitioners' arguments regarding the substantive validity of the effluent guidelines. Petitioners have moved that these cases be consolidated for argument and determination.

(EPA) under Section 304(b) of the Federal Water Pollution Control Act, as amended (the "Act") (33 U.S.C. § 1314(b)).

This action raises basic legal issues respecting the proper interpretation to be given key regulatory sections of the Act and issues of a combined technical and legal nature pertaining to the substantive regulations themselves.

The Parties

The Petitioner in this case and the Petitioners in the related case are manufacturers of tires and inner tubes, and are subject to the regulations here in issue.

Russell E. Train is Administrator of the Environmental Protection Agency.

Questions Presented

1. Does this Court have jurisdiction to review, on a petition for review, regulations issued by the Agency under Section 304(b) of the Act?

2. Can EPA change the statutory pattern of review by claiming that the regulations it has issued are also "limitations" under Section 301 with the asserted consequence that regulations under Section 304(b) are reviewable only in the Court of Appeals?

3. Is EPA authorized by the Act to issue effluent limitations by regulation under Section 301?

4. Do the regulations promulgated by EPA establishing effluent guidelines comply with the Act?

Statutes and Regulations Involved

Sections 301, 302, 304, 306, 307, 309, 505 and 509 of the Act (33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1319, 1365 and 1369) which were added to the Act by the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500, 86 Stat. 816) are set out in Addendum A to this brief.

The regulations here in issue were published on February 21, 1974 (39 Fed. Reg. 6659), and appear in the record at App. 2836.^{1/} A correction to the regulations was published on July 19, 1974. 39 Fed. Reg. 26423. The original and amendatory regulations are set out in Addendum A to Petitioners' Brief in No. 74-1809.

Jurisdiction

Petitioners contend that this Court does not have jurisdiction to review effluent guideline regulations and that review should

^{1/}

By Order of September 12, 1974, the Court has approved the filing of a consolidated deferred Appendix for this petition and the petition in No. 74-1809. EPA has filed a consolidated record for both petitions. The record is paginated consecutively and to avoid triple pagination, the EPA pagination will be used. The Appendix will be referred to as "App."

be in the District Court^{1/} under the Administrative Procedure Act (5 U.S.C. §§ 701-706) and the jurisdictional provisions of the Judicial Code (28 U.S.C. §§ 1331, 1332, 1337, 1361, 1651). The EPA rulemaking process began on August 6, 1973. 38 Fed. Reg. 21202, App. 2480. On February 25, 1974, EPA publicly took the position that these regulations are issued under both Section 301 and Section 304 and that because the regulations are under both Sections 301 and 304 the Courts of Appeals have jurisdiction to review them under Section 509(b) of the Act. Section 509(b) requires that a petition for review be filed within 90 days; as a consequence of EPA's position, these protective petitions were filed.

The Court is aware that the jurisdictional issue has been raised by the Intervenor and briefed in Natural Resources Defense Council, Inc. v. EPA, No. 74-1258. That case has been calendared for argument. The jurisdictional issue was raised and briefed in Hooker Chemicals and Plastics Corporation, et al. v. Train, Second Circuit, No. 74-1683, and in E. I. du Pont de Nemours

^{1/} Petitioners have filed a complaint challenging these regulations in the United States District Court for the District of Maryland, Goodyear Tire & Rubber Company, et al. v. Train, Civil Action No. HM 74-1057.

& Co. v. Train, Fourth Circuit, No. 74-1261. The latter case has also been calendared for argument.

Two unreported opinions of United States District Courts have held that regulations issued by EPA for the sulfuric acid subcategory of the Inorganics Chemicals Manufacturing Point Source Category (40 C.F.R. §§ 415.21-415.23, 39 Fed. Reg. 9634 (March 12, 1974)) and regulations for the pulp, paper and paperboard industries (40 C.F.R. §§ 430.10-430.56, 39 Fed. Reg. 18742-52 (May 29, 1974)) are limitations issued under Section 301 of the Act and subject to review only in the Courts of Appeals pursuant to Section 509 of the Act. E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., Civil Action No. 74-57 (W.D. Va. Sept. 27, 1974) (Turk, C.J.); American Paper Institute v. Russell E. Train, et al., Civil Action No. 74-814 (D.D.C. Sept. 17, 1974) (Pratt, J.). The opinions in these cases are attached as Addendum B and Addendum C, respectively.

Since the jurisdictional issue has not been resolved by a Court of Appeals, Petitioners of necessity are presenting the issue in these proceedings. The Court will reach the substance of the guideline regulations discussed in Petitioners' Brief in No. 74-1809 only if it decides as a threshold matter that it has jurisdiction.

Statement of the Case

The Administrative Proceedings

EPA began the administrative proceedings for effluent guidelines on August 6, 1973, with an Advance Notice of Public Review Procedures for Proposed Effluent Limitation Guidelines and Standards of Performance for New Sources. 38 Fed. Reg. 21202, App. 2480. On October 11, 1973, EPA announced proposed rule-making fixing effluent guidelines and new source standards for the Rubber Processing Point Source Category, including regulations for two subcategories that now comprise the Tire and Inner Tube Plants Subcategory. 38 Fed. Reg. 28219, App. 2784. On February 21, 1974, final regulations were published for the Rubber Processing Point Source Category. 39 Fed. Reg. 6659, App. 2836. An amending regulation to correct typographical errors was published on July 19, 1974. 39 Fed. Reg. 26423. (The Court is respectfully referred to Petitioner's Brief in No. 74-1809 for further discussion of the administrative proceedings.)

The Statutory Framework

The Federal Water Pollution Control Act, as basically and extensively revised by the 1972 Amendments, constitutes the organic statute under which all effluent discharges from industrial plants and municipalities are regulated.

The Act prohibits all discharges except as they are permitted under the law. Section 301 (33 U.S.C. § 1311). Permits setting limitations on effluent discharges are issued under Section 402 of the Act (33 U.S.C. § 1342), and the limits and conditions which restrict the discharge of an individual industrial plant are fixed in the permit after proceedings conducted under Section 402.

The permit procedure is based on the congressional policy that the primary responsibility for water quality protection shall be given to the States. Section 101(b) (33 U.S.C. § 1251(b)). EPA is required to turn the permit granting authority over to the States when State programs meet the requirements of the Act. See Sections 402(b)-(f) (33 U.S.C. §§ 1342(b)-(f)).

The regulatory plan based on the permit system was selected by Congress because there would be multiple permitting authorities: the States, where EPA has approved the State plan under Section 402, and EPA, where the State has not yet qualified. To assure uniformity among these permitting authorities, Section 301 provides for a definition of objectives in terms of technology and time. The same section also directs complex regulations to be issued under Section 304(b) as guidelines to be applied in the permit process. The permit process is the point where actual

effluent limitations and compliance schedules are fixed under Section 402.

The critical role of the guideline regulations in the statutory plan is apparent from the statute. Section 301 provides in part:

Sec. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved --

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

* * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement

any applicable water quality standard established pursuant to this Act. 2(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act . . . (emphasis added).

The "objective" in Section 301 is set forth in terms of effluent limitations for point sources which shall require the application of "best practicable control technology currently available" by 1977 and "best available technology economically

achievable" by 1983. These technological objectives are to be defined and determined by regulations under Section 304(b),^{1/} Before turning to the provisions of Section 304(b), it is important to note that the objectives to be achieved under Section 301 are set out in terms of "effluent limitations" requiring the application of the technology as determined under Section 304(b) regulations. The term "effluent limitation" as defined in Section 502(11) refers to limitations established by a permitting authority--EPA or a State--in a permit. That section provides:

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone or the ocean, including schedules of compliance. (emphasis added).

Section 304(b) provides for guideline regulations to be issued for the purpose of "adopting or revising effluent limitations under the Act" (emphasis added). Section 304(b) provides:

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall,

^{1/} The statute uses "defined" in Section 301(b) (1) (A) and "determined" in Section 301(b) (2) (A).

after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall --

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.
(emphasis added).

Section 304(b) regulations are to be comprised of two component parts. First, they must identify the degree of effluent reduction attainable by 1977 through the application of "best practicable control technology currently available" for classes and categories of point sources. Section 304(b)(1)(A). Second, they must also "specify factors to be taken into account in determining control measures and practices to be applicable to point sources . . . within such categories and classes." Section 304(b)(1)(B). Congress explicitly set out the factors which EPA was to specify and elaborate with further precision in the regulations. The effluent guidelines relating to the 1983 requirement of "best available technology economically achievable" also must include the degree of effluent reduction and EPA's specification of factors to be considered in determining the application of the technology to "any point source . . . within such categories and classes." Sections 304(b)(2)(A), (B).

The procedure under which the objectives of Section 301 are to be spelled out in Section 304 regulations and applied in the permit process under Section 402 is confirmed by Section 301(d) of the Act. Section 301(d) provides:

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate,

revised pursuant to the procedure
established under such paragraph.
(emphasis added).

The procedure for revision established by paragraph (2) of subsection (d) is the application of best available technology as determined by regulations under Section 304(b). In conformity, Section 304(b) provides that guideline regulations shall be issued for "adopting or revising effluent limitations under this Act" (emphasis added).^{1/} Thus the congressional plan was complete.

The legislative history confirms this regulatory pattern under which the technological objectives specified in Section 301 are spelled out in guideline regulations under Section 304(b). The guideline regulations identifying the technology and the reduction in pollution achievable together with the factors relevant to the application of the technology provide the standards

^{1/} The reference in Section 301(d) to a revision every five years stems from the fact that the maximum permit period is five years and Congress wanted the procedure of new guidelines regulations every five years for point sources which had not achieved no-discharge in the earlier five-year period. S. Rep. No. 92-414, 92d Cong., 1st Sess. 46 (1971), reprinted in Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 1464 (Committee Print 1973) (hereinafter referred to as "Legislative History").

by which the permit authorities determine the effluent limitations in the permit procedure. Thus the Senate report described the regulatory pattern of the Act:

The program proposed by this Section [301] will be implemented by permits issued under Section 402.

* * *

A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program.

The information on the technology of control developed under Section 304 should facilitate the administration of this system.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 42, 72 (1971), Legislative History 1460, 1490. The same statutory pattern was made clear in a colloquy between Senator Muskie (a principal supporter and author of the bill) and Senator Mathias:

Mr. Mathias. Does Section 301(b) (2) (A) on p. 76 contemplate that a State or the Administrator, if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?

Mr. Muskie. Section 301(b) (2) (A), as well as Section 301(b) (1) anticipates individual application of control under the permit program established under Section 402.

* * *

. . . Criteria under Section 304(a) are to be applied in determining quality of water not in setting effluent limitations. The information under Section 304(b) is to be used in setting effluent limitations.

117 Cong. Rec. 17454 (daily ed. Nov. 2, 1971), Legislative History 1391 (emphasis added). Senator Muskie's summary of the Conference Committee's deliberations clearly demonstrates that the permit-issuing authority, whether a State or EPA, is to apply Section 304 guideline regulations in permit proceedings, not regulations establishing limitations under Section 301:

NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM [SECTION 402]

The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements.

118 Cong. Rec. 16875 (daily ed. Oct. 4, 1972), Legislative History 176.

Summary of Argument

1. EPA proposed for comment and promulgated the regulations here in issue as effluent guidelines pursuant to Section 304(b) of the Act. Regulations under Section 304(b) are not reviewable under Section 509, and are reviewable only in the District Courts under the Administrative Procedure Act. Recognizing that fact, EPA has argued that these regulations are also limitations under Section 301. EPA fails to appreciate that the Act does not provide a procedure for establishing effluent limitations under Section 301 by regulation apart from their being set through conditions of a permit issued pursuant to Section 402. The "effluent limitations" referred to in Section 301 are set in permit proceedings for particular plants and play a very different role in the statutory scheme than effluent guidelines issued under Section 304(b).

2. The effluent guidelines promulgated by EPA do not comply with the requirements of the Act in several respects. Section 304(b) requires EPA not only to determine levels of effluent reduction attainable through the use of the designated technology (best practicable control technology currently available for the 1977 guidelines and best available technology economically achievable for the 1983 guidelines) but also to specify factors to be taken into account in determining control measures and

practices to be applicable to point sources. In promulgating rigid, single-number limits in lieu of ranges of values and in failing completely to specify the factors indicated by the Act, EPA neglected its statutory obligations.

3. Under applicable principles of review an agency must give a satisfactory reasoned statement showing it has considered the relevant factors in applying the statute. Here EPA did not.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER THE PROVISIONS OF SECTION 509 OR ANY OTHER STATUTE TO REVIEW THE EFFLUENT GUIDELINE REGULATIONS

EPA has publicly taken the position that this Court has jurisdiction over review of the guidelines regulations under Section 509(b) of the Act (33 U.S.C. § 1369(b)). In view of EPA's statements, and because of the short time limits provided in Section 509(b), protective petitions for review respecting the effluent guidelines were filed. However, Petitioners contend that the Courts of Appeals, and thus this Court, have no jurisdiction to review the guideline regulations. Section 509 calls for review of only a limited number of EPA regulatory actions, taken under explicitly listed sections of the Act, and Section 509 does not provide for review of regulations establishing guidelines issued under Section 304(b).

A. Review Under Section 509 Is Limited To Actions
Taken Under Specified Sections Of The Act And
Does Not Include Actions Under Section 304(b)

The normal method of review of actions by the Administrator under the Federal Water Pollution Control Act is under the Administrative Procedure Act (5 U.S.C. §§ 701-706), as complemented by such ancillary jurisdictional statutes as the Mandamus and Venue Act of 1962 (Pub. L. No. 87-748), codified in 28 U.S.C. § 1361.^{1/} See, e.g., Peoples v. United States Department of Agriculture, 427 F.2d 561, 564-565 (D.C. Cir. 1970). Congress chose, however, to establish a special review in the Court of Appeals for selected, specific, identified acts by the Administrator. Section 509(b) (33 U.S.C. § 1369(b)) provides:

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b) (1) (C), (C) in promulgating

^{1/} Judge Pratt, without analysis or discussion, concluded that regulations under Section 304(b) are not subject to judicial review and that the only review under the statute is of effluent limitations promulgated under Section 301. American Paper Institute v. Russell E. Train, et al., supra, Addendum C at 3. Judge Turk concluded that the challenge to the Section 304(b) regulations was "in essence" a challenge to EPA's authority to issue effluent limitations under Section 301 and therefore reviewable only in the Courts of Appeals. E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, Addendum B at 15.

any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302 or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Nothing in the legislative history suggests that Section 509 was intended to be more inclusive than its terms state or that regulations under Section 304(b) establishing effluent guidelines impliedly are to be reviewed under Section 509. This analysis is confirmed by the subsequent history of the legislation. While Congress in 1973 amended the Act ^{1/} to correct "oversights or

^{1/} See Pub. L. No. 93-207 (87 Stat. 906).

incorrect references"^{1/} and in the course thereof modified Section 509, the sole change was to designate pretreatment standards under Section 307(b)^{2/} as being subject to review under Section 509.

A general statutory judicial review plan to have all actions by EPA reviewable in the District Court except those designated in Section 509(b) is shown by the many actions of EPA listed in Addendum D, infra, which are reviewable under the Administrative Procedure Act in the same manner as the guidelines at issue here. Notably also, all actions taken under the authority of the Federal Water Pollution Control Act by agencies other than EPA^{3/} are reviewable initially in the District Courts under the Administrative Procedure Act.

Congress had a logical goal in mind when in Section 509 it limited review in the Court of Appeals to such specified

^{1/} H.R. Rep. No. 93-680, 93d Cong., 1st Sess. (1973).

^{2/} Significantly, the inclusion of these pretreatment standards under Section 307(b) was not accompanied by inclusion of pretreatment guidelines under Section 304(f) (33 U.S.C. § 1314(f)).

^{3/} These actions include important adjudicatory and rulemaking decisions by agencies such as the Corps of Engineers, the Coast Guard, the Federal Maritime Commission, and the Council on Environmental Quality.

actions. Each of the substantive sections listed in Section 509 contains a prohibition, or authorizes EPA to promulgate regulations or to approve specially (without promulgation in regulations) restrictions or limitations which may in certain circumstances be enforced by EPA (and the courts) directly against a violator pursuant to the provisions of Section 309 (33 U.S.C. § 1319).^{1/} Moreover, the prohibitions, regulations, or specially approved limitations or restrictions of the listed substantive sections may also be enforced by "citizen suits" brought against violators under Sections 505(a) and (f) of the Act (33 U.S.C. §§ 1365(a), (f)). As a result, a special, definitive mode of review in the Court of Appeals was deemed appropriate.

On the other hand, review of actions by EPA other than those listed in Section 509 and by other agencies empowered to act under the Act were to proceed under the otherwise applicable provisions of the Administrative Procedure Act. Review of these

^{1/} It is significant to note that Section 309 provides both criminal and civil penalties for a violation of Section 301. Sections 309(c)(1), 309(d), (33 U.S.C. §§ 1319(c)(1), 1319(d)). If EPA is correct, it is creating a massive new set of criminal laws by establishing limitations under Section 301. It is easy to see how Congress intended the absolute prohibition on discharges without a permit as provided by Section 301(a) to be enforced by criminal penalties but nothing in the statute or its legislative history suggests Congress intended the creation of a new criminal code by regulations under Section 301. See pages 45-49, infra.

other actions, including the regulations constituting the effluent guidelines under Section 304(b), might be fully as important as review of the specially listed actions, but the regulations issued under the non-specified sections often contemplate or require that further implementing steps be taken by the agency involved or by a court before direct applicability of such regulations is achieved.^{1/}

Moreover, since Congress required the guideline regulations under Section 304(b) to be issued within one year of passage of the Act to specify technology for the 1983 standard and the factors applicable in determining the application of that technology, it makes sense that the review of those regulations come at a more suitable time, not within 90 days of the publication of the initial regulations. This is particularly appropriate since the statute directs that EPA shall review and, if appropriate, revise the regulations "at least annually."

Section 304(b)(1) (33 U.S.C. § 1314(b)(1)). EPA will not be issuing permits for the 1983 standard until 1979 and EPA at present is forced to forecast and indeed in many cases to guess

^{1/} A similar pattern in which some administrative actions are reviewable in the Courts of Appeals under special provisions while other actions are subject to the normal District Court review is found in other statutes. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (Food, Drug and Cosmetics Act).

what technology satisfies the statutory requirement of "availability" to achieve the 1983 goal. EPA will in the course of statutorily mandated review refine its regulations, so that judicial review is obviously more appropriate at a time nearer the moment when the regulations for 1983 will be applied in permits.

B. EPA's Recently Adopted Claim That The Regulations Also Constitute Effluent Limitations Under Section 301 Contravenes The Administrative Procedure Act

1. The regulations establishing effluent guidelines were, as required by the Act, promulgated under Section 304(b)

The Act was passed and became effective October 18, 1972. Section 304(b) provides that "the Administrator shall publish regulations providing guidelines for effluent limitations within one year of enactment."

When EPA did not meet the one-year deadline, the Natural Resources Defense Council brought suit in the United States District Court for the District of Columbia and on Motion for Summary Judgment, the Court issued an order which stated in part:

1. Defendants [EPA] have a mandatory nondiscretionary duty to publish within one year of enactment of the Act final Section 304(b)(1)(A) effluent limitation guidelines necessary to provide comprehensive coverage of all point source discharges;

2. The proposed schedule for publication of the guidelines shall have a final deadline of no later than October 1, 1974, in order that the guidelines may be applied meaningfully in the NPDES permit program established by Section 402 of the Act.

Natural Resources Defense Council, Inc. v. Train, 6 E.R.C. 1033 (D.D.C. 1973) (emphasis added).

In August, 1973, EPA announced the public review procedures with respect to "effluent limitations guidelines, standards of performance, and pretreatment standards for new sources pursuant to Sections 304(b), 306 and 307(c) of [the Act]." 38 Fed. Reg. 21202 (Aug. 6, 1973), App. 2480 (emphasis added).^{1/} The notice further (i) stated that its purpose was to "explain EPA's overall plans for development of effluent limitations guidelines . . . and the approach which is being taken by the Agency in discharging the duties placed upon the Administrator under [section] 304(b) . . . of the Act;" (ii) emphasized the importance of public "exposure of the technical basis and reasoning underlying regulations to be established pursuant to Section 304(b), 306 and 307(c);" (iii) explained

^{1/} Section 306 relates to "National Standards of Performance" for control of effluents from new plants and Section 307(c) relates to pretreatment standards (i.e., standards governing the pretreatment of waste being discharged into a municipal treatment plant).

that the technical studies for which EPA contracted were to "serve as a foundation for the regulations to be issued under Section 304(b) and 306 of the Act;" and (iv) requested comments on "its overall approach and legal interpretation of its responsibilities under Sections 304(b), 306 and 307(c) of the Act." 38 Fed. Reg. 21202, 21203, 21206 (Aug. 6, 1973), App. 2480, 2481, 2485 (emphasis added).

Thereafter EPA followed this indicated reliance on Section 304(b) in actually proposing guidelines for various categories of effluent dischargers. For example, the statement of "legal authority" in the preamble to the proposed regulations for the Rubber Processing Point Source Category relies specifically and solely on Section 304(b) for authority:

Section 304(b) of the Act requires the Administrator to publish regulations providing guidelines for effluent limitations The regulations proposed herein set forth effluent limitations guidelines, pursuant to Section 304(b) of the Act, for the . . . rubber processing category.

38 Fed. Reg. 28220 (Oct. 11, 1973), App. 2785 (emphasis added).

This statement of legal basis for the regulations was incorporated by reference and without modification in the preamble to the final

regulations published on February 21, 1974. 39 Fed. Reg. 6660, App. 2837.

Furthermore, prior to the issuance of the final regulations for the rubber processing industry, EPA recognized that effluent guidelines limitations are to be issued under Section 304(b) in so defining that term: "The term 'effluent limitations guidelines' means any effluent limitations guidelines issued by the Administrator pursuant to section 304(b) of the Act." 40 C.F.R. § 401.11(j), 39 Fed. Reg. 4532 (Feb. 4, 1974).

The critical documents prepared by EPA in the rulemaking process also confirm that these regulations were intended to be under Section 304(b) and were so announced.^{1/} In releasing the Contractor's Report for comment, EPA stated:

The regulations to be published by EPA under Sections 304(b) and 306 of the Federal Water Pollution Control Act, as amended, will be based to a large extent on the report and the comments received on it.

App. 3. Later, in the Draft Development Document issued by EPA when it published the proposed regulations in October,

^{1/} Judge Turk's decision in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, and Judge Pratt's decision in American Paper Institute v. Russell E. Train, et al., supra (attached as Addendum B and Addendum C) were made without benefit of examination of the full administrative record.

1973, EPA described its methodology and proposed findings and made the following statement:

This document presents the findings of a study of the tire and inner tube and synthetic rubber segments of the rubber processing industry by Roy F. Weston, Inc. for the Environmental Protection Agency, for the purpose of developing effluent limitation guidelines, Federal standards of performance, and pretreatment standards for the industry, to implement Sections 304, 306, and 307 of the Federal Water Pollution Control Act, as amended (33 USC 1251, 1314, and 1316; 86 Stat 816).

App. 2550 (emphasis added). In the section of the Draft Development Document entitled "Purpose and Authority," the following statement was made:

The regulations proposed herein set forth effluent limitations guidelines pursuant to Section 304(b) of the Act for the tire and inner tube and the synthetic rubber subcategories of the Rubber Processing Industry.

App. 2562 (emphasis added). Significantly, nowhere is there any statement referring to regulations under Section 301.

EPA now, however, claims that these regulations constitute "effluent limitations" under Section 301(b) as well as guidelines under Section 304(b), and further, that the status of the regulations as limitations far overshadows their mere "definitional"

character as guidelines, although EPA nowhere indicates what the regulations "define." EPA first publicly stated this position when it released for public distribution an "Environmental Protection Agency Memorandum on Judicial Review of Effluent Limitations Guidelines," dated February 25, 1974 (attached as Addendum E, and also reprinted at 4 Environment Reporter, Current Developments, at 1833-34). It subsequently elaborated such position in, inter alia, its brief to this Court in Natural Resources Defense Council, Inc. v. EPA, No. 74-1258.

However, while EPA is now telling this Court that the regulations are under Section 301, it is telling the United States Court of Appeals for the District of Columbia Circuit that it is required to issue guideline regulations under Section 304(b) such that they can be used in fixing effluent limitations in permits, in contrast to its position here which in effect reads Section 304(b) out of the Act. EPA has taken an appeal in Natural Resources Defense Council, Inc. v. Train, No. 74-1433 (D.C. Cir.) (see page 25, supra), and in its opening brief EPA described the action as follows:

On August 14, 1973, the Natural Resources Defense Council, Inc. (hereafter NRDC), filed this action against the Administrator of the Environmental Protection Agency and the Environmental Protection Agency

(hereafter referred to collectively as the Administrator) seeking a declaratory judgment that Section 304(b)(1)(A) of the Federal Water Pollution Control Act Amendments of 1972 (hereafter FWPCA) created a ministerial, non-discretionary duty in the Administrator to publish effluent limitation guidelines for all classes and categories of point sources covering all point source discharges of pollutants by October 18, 1973. NRDC also sought an order--essentially a mandatory injunction--directing the Administrator to publish as expeditiously as possible and according to a schedule approved by the district court, effluent limitation guidelines under Section 304(b)(1)(A) covering all point source discharges with the last guideline to be published no later than April 1, 1974 (App. 28-29, Complaint, pp. 2-3).

NRDC v. Train, supra, Appellant's Brief at 3-4 (emphasis added).

EPA also said that it knew it was under a duty to issue guideline regulations and that it was complying:

The Administrator now recognizes that he was and is under a clear duty to issue effluent limitation guidelines covering at least those 27 general categories of point sources set forth in Section 306(b)(1)(A) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), and does not dispute the propriety of the district court's order that he issue such effluent limitation guidelines. The Administrator is proceeding as quickly as humanly possible to issue

such guidelines. To date, the Administrator has promulgated effluent guidelines covering, in whole or in part, 23 of the 27 specified categories. The remaining four categories-- seafood, iron and steel manufacturing, textile manufacturing, and steam electric power plants-- should have effluent limitation guidelines, covering these categories in whole or in part, by no later than August 30, 1974. Effluent limitation guidelines covering the remaining portions of these categories will be promulgated as soon as scientifically, technically, and humanly possible. Promulgation of guidelines based on less than adequate technical and scientific bases serve no one's purpose other than those who wish to delay and frustrate the congressionally established goals by repeated judicial challenges to the validity of the guidelines.

NRDC v. Train, supra, Appellant's Brief at 12-13 (emphasis added). In the present proceedings EPA is trying to forget Section 304 and to bootstrap its position by discovering authority by implication in Section 301 to set inflexible limitations by regulation. If EPA believed that it was issuing regulations under Section 301, it is strange it did not say so in the NRDC case, for there are no time constraints under Section 301 comparable to those for regulations under Section 304(b).^{1/}

^{1/} Judge Turk in his decision in E.I. du Pont de Nemours, et al. v. Russell E. Train, et al., supra, merely stated that the issue of statutory construction now presented was not addressed in NRDC v. Train. Addendum B at 20, n.3.

2. It is too late under the Administrative Procedure Act for EPA to claim that the regulations constitute effluent limitations under Section 301

EPA's action in asserting that it had issued the final Section 304(b) guidelines as effluent limitations within the meaning of Section 301(b) as well came as a surprise to those persons and companies who were interested in the guidelines and their impact.

Obviously, guideline regulations, when issued in a form which not only identified the technology but also contained the specific factors bearing on its application, could be applied effectively in a permit proceeding for an individual industrial plant to achieve the technological goals set out in Section 301. EPA at first seemed to be willing to travel this statutorily specified path. But, through an evolution of views, EPA seems to have resolved to convert what were proposed as guideline regulations into actual effluent limitations which would be "mechanically" applied to a plant or discharge point source to which it was relevant. See Defendants' Supplemental Memorandum at 3, E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra.

EPA's action in only now denominating the regulations as effluent limitations at the very least constitutes rulemaking without notice and by fiat. (Indeed, EPA has in effect now

recognized that it failed to give the requisite notice. The preamble to the proposed regulations for the Grain Mills Manufacturing Point Source Category published on September 17, 1974, states, "The regulation proposed herein sets forth effluent limitations and guidelines pursuant to sections 301 and 304(b) of the Act. . . ." 39 Fed. Reg. 33470 (emphasis added). Thus, EPA is now giving the express notice which it failed to give here.) Under such circumstances the status of the regulations as limitations contravenes the notice and opportunity-to-comment requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. § 553).^{1/} See Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972); cf. Pharmaceutical Mfrs. Assn. v. Finch, 307 F. Supp. 858 (D. Del. 1970). In the Wagner Electric case, the Court of Appeals set aside a regulatory standard promulgated by the National Highway Traffic Safety Administration in comparable circumstances.

C. The Act Does Not Contemplate Or Authorize
Effluent Limitations Prescribed By Regulation

The Act and the regulatory scheme it establishes demonstrate that the Administrator has no power to establish effluent

^{1/} Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, recognized the notice issue but did not decide it on the ground that the issue should be presented to the Court of Appeals. See Addendum B at 18-19.

limitations by regulation. Section 301(b), 33 U.S.C. § 1311(b), provides in part that:

(b) In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act

Section 301 carefully provides that the "objective" to be "achieved" is effluent limitations at the technical level described, not that the effluent limitations be separately established by rule. Furthermore, no procedure for establishing limitations from effluent guidelines is contained in Section 301(b). Notably also, in view of the many other time limits for various rulemaking steps, Section 301(b) contains no time limit for establishing limitations-- although, of course, the objective is that the limitations at the two levels set forth in Section 301(b) must be achieved by July 1, 1977, and July 1, 1983.

It should be noted that Sections 301(b) (1) (A) and 301(b) (2) (A) provide that the limitations which must be "achieved" can be derived from the pretreatment standards of Section 307, as well as from effluent guidelines under Section 304(b). It makes no sense, as EPA's argument implies, that there

should be regulations under Section 301 fixing effluent limitations for pretreatment which "shall assure compliance" with Section 307, when the standards under Section 307 are made effective by their issuance as regulations under Section 307.^{1/} EPA would apparently have the Administrator issue a separate new regulation setting pretreatment effluent limitations, although such regulations had already been issued under Section 307. All of the sections providing for substantive standards and guidelines come together in permit proceedings; only then does the actual effluent limitation appear. These provisions all fit together into a comprehensible unitary Act only when Section 301(b) is considered as defining an objective to be achieved.

The one-year deadline for publication of Section 304(b) guidelines underlines the congressional intention that the guidelines be available to establish the range of base points to be used in processing permit applications under Section 402. A "moratorium" until December 31, 1974, on enforcement of most violations of the Act where applications for Section 402 permits were pending was written into Section 402(k) (33 U.S.C. § 1342(k)).

^{1/} Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra (attached as Addendum B), did not address this point.

Thus, Congress reserved the first year for development of the procedural rules and the substantive effluent guidelines (under Section 304(b)) and then allowed a period of one year and several months for implementation through the permit process.

Given this tight time schedule, Congress decided not to have EPA develop binding or prescriptive effluent limitations independently by regulation. Rather, by providing specifically for regulations constituting effluent "guidelines," ^{1/} Congress allowed rapid development of regulations which would offer some play in the joints of the entire regulatory scheme to correct any difficulties created in their application to the many and varied individual permit situations without jeopardizing the achievement of the broad goals of Section 301(b).

The effluent guidelines are to provide the range of

^{1/} "Guidelines" are employed in other areas of law where a range of actions is reasonable and appropriate and single hard and fast numbers are not deemed suitable. For example, HEW issues guidelines and not prescriptive regulations for school desegregation plans. United States v. Jefferson County Board of Education, 372 F.2d 836, 847-848 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). The Council on Environmental Quality has issued rules (40 C.F.R. Part 1500, 38 Fed. Reg. 20550 (Aug. 1, 1973)) to aid in the implementation of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), which provide guidelines and do not constitute or "prescribe regulations governing compliance with NEPA." Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 421 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

effluent reductions (under Sections 304(b)(1)(A) and (2)(A)) which EPA finds achievable by use of best practicable and best available technologies from the application of technical, engineering and economic expertise to the information obtainable within the tight time constraints of the Act. S. Rep. No. 94-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468. EPA's specification of the factors listed in Sections 304(b)(1)(B) and (2)(B) is to provide the criteria for applying those ranges to individual plants. See discussion at pages 49-55, infra.

Section 402 respecting permits for discharges knits together these statutory threads. It is in permit proceedings that the effluent reduction ranges established by EPA are to be applied in accordance with the objective factors elaborated and set forth by EPA in the effluent guidelines. The results are effluent limitations which even-handedly require point sources to achieve the requirements of Section 301(b) by compliance with specific, concrete and enforceable effluent limitations in discharge permits.

Section 402 also establishes the link in the Federal-State partnership mandated by Congress. Under Sections 402(b)-(f), a State can develop a suitable plan for implementing a permit program and thereby displace the permit program estab-

lished by EPA under Section 402 (a) for the State's geographic area.^{1/} To be an appropriate "approved" program the State permit program must, among other things, apply the substantive requirements set by the Act and by the Administrator for point source discharges. Section 402 (b) (1).

When the approval of the State permit program serves to transfer permit authority to the State through operation of the Act, EPA is not divested of all control over the permit process in that State. Not only are the States required to apply the effluent guidelines promulgated by EPA, but Congress in Section 402 (d) provided for review and veto by the Administrator^{2/} of individual permits issued by States with approved programs:

(2) No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside

^{1/} Fifteen States have qualified and are administering the permit program. 39 Fed. Reg. 26061 (July 16, 1974).

^{2/} The Administrator may also invoke a statutorily set procedure for withdrawing approval for a State program, under Section 402 (c) (3). But this withdrawal of approval is a drastic remedy which would eliminate the State completely as a participant in the Act's scheme.

the guidelines and requirements
of this Act. (emphasis added).^{1/}

It is difficult to see how Congress could be more explicit in its intention and direction that the regulations under Section 304 become the means enabling the permit authorities (EPA or the States) acting under Section 402 to fix effluent limitations in the permits so that the "objectives" set out in Section 301 would be "achieved."

EPA has argued that the judicial review provisions of the Act (in Section 509 (33 U.S.C. § 1369)) imply that effluent limitations at least can exist in the form of regulations issued under Section 301, and thus that there is implied authority in the Act for such regulations. This argument was made in the publicly distributed EPA memorandum dated February 25, 1974, from Alan G. Kirk, II, the Assistant Administrator for Enforcement and General Counsel (Addendum E).

^{1/} Judge Turk interpreted the reference to "guidelines and requirements of the Act" to mean procedural guidelines under Section 304(h) since there are specific references to Section 304(h) guidelines in Sections 402(b), 402(c)(1) and (2) and 402(e). E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, Addendum B at 12. On the contrary, the fact that Section 304(h) guidelines were carefully referred to in other sections, and that the word "guidelines" is used without specific reference in Section 402(d), indicates that Congress intended that EPA's review of State permits was to be not only for procedure under Section 304(h) but also for substance under the Section 304(b) regulations.

Rather than supporting EPA's claim, the provisions of Section 509 and other related sections indicate clearly that Congress had no intention that effluent limitations be established by regulation under Section 301(b).

The definitional section of the Act provides:

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

Section 502(11) (33 U.S.C. § 1362(11)) (emphasis added). Obviously a State could not issue regulations implementing Section 301, so the definition itself indicates (1) that effluent limitations do not involve regulations and (2) that the States and the EPA have a shared role in establishing effluent limitations.

Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, looks to the special definition of "effluent limitations" in Section 505(f) relating to citizens' suits as indicating that EPA be authorized to issue effluent limitations by regulation under Section 301(b). Addendum B at 10. Section 505(f) defines "effluent limitations" to mean:

the guidelines and requirements
of this Act. (emphasis added).^{1/}

It is difficult to see how Congress could be more explicit in its intention and direction that the regulations under Section 304 become the means enabling the permit authorities (EPA or the States) acting under Section 402 to fix effluent limitations in the permits so that the "objectives" set out in Section 301 would be "achieved."

EPA has argued that the judicial review provisions of the Act (in Section 509 (33 U.S.C. § 1369)) imply that effluent limitations at least can exist in the form of regulations issued under Section 301, and thus that there is implied authority in the Act for such regulations. This argument was made in the publicly distributed EPA memorandum dated February 25, 1974, from Alan G. Kirk, II, the Assistant Administrator for Enforcement and General Counsel (Addendum E).

^{1/} Judge Turk interpreted the reference to "guidelines and requirements of the Act" to mean procedural guidelines under Section 402(b) since there are specific references to Section 304(b) guidelines in Sections 402(b), 402(c)(1) and (2) and 402(e). E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, Addendum B at 12. On the contrary, the fact that Section 402(b) guidelines were carefully referred to in other sections and the word "guidelines" is used without specific reference in Section 402(d) indicates that Congress intended that EPA's review of State permits was to be not only for procedure under Section 402(b) but also for substance under Section 304(b) regulations.

Rather than supporting EPA's claim, the provisions of Section 509 and other related sections indicate clearly that Congress had no intention that effluent limitations be established by regulation under Section 301(b).

The definitional section of the Act provides:

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

Section 502(11) (33 U.S.C. § 1362(11)) (emphasis added). Obviously a State could not issue regulations implementing Section 301, so the definition itself indicates (1) that effluent limitations do not involve regulations and (2) that the States and the EPA have a shared role in establishing effluent limitations.

Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, looks to the special definition of "effluent limitations" in Section 505(f) relating to citizens' suits as indicating that EPA be authorized to issue effluent limitations by regulation under Section 301(b). Addendum B at 10. Section 505(f) defines "effluent limitations" to mean:

(1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act . . . (4) prohibition, effluent standard or pretreatment standards under section 401 of this Act . . . or (6) a permit or condition thereof under section 402 of this Act

However, the reference in Section 505(f)(2) to effluent limitations under Section 301 means the limitations established by the Administrator for a single point source pursuant to his authority under Section 301(c) to modify 1983 requirements in certain special cases. Certainly the definition does not mean or contemplate effluent limitations by regulation under Section 301(b).

Section 509 provides in relevant part that

(b)(1) Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States

Section 509(b)(1) (33 U.S.C. § 1369(b)(1)) (emphasis added).

Two actions by the Administrator under Section 301 are covered by Section 509(b)(1)(E): first, limitations established under Section 301(c) for a particular point source modifying the 1983 requirements; second, action by the Administrator in "approving" an effluent limitation under Section 301. Both

EPA and Judge Turk treat the word "approving" as redundant, when it in fact refers to the action of the Administrator in reviewing State permits under Section 402 to determine whether they meet the "guidelines and requirements of the Act." Section 402(d)(2). Through use of the effluent guidelines, the State is to set in the permit the effluent limitations within the meaning of the definition found in Section 502(11). As a result, in reviewing the proposed permit forwarded by the State, EPA is reviewing and approving or disapproving^{1/} the effluent limitations set by the State in that proposed permit.

Consequently, Section 509(b)(1) authorizes review in the Federal Courts of Appeals of EPA action in reviewing the terms of a State-proposed permit. Among other things, this provision solved for Congress the problem of how federal review could be

^{1/} Earlier versions of the bill that became the Federal Water Pollution Control Act Amendments of 1972 actually required EPA to take the affirmative step of approving the permit's effluent limitation before the State-proposed permit could become effective. S. 2770 (the bill which ultimately became law) in the form in which it was passed by the Senate provided that: "No permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of the Act." S. 2770, § 402(d)(2), 92d Cong., 1st Sess. (1971), Legislative History 1690. Understandably, at that time the language of Section 509(b) contained the "approving or promulgating" reference (see id. at 1713) which it still retains, although in the enacted version of the bill the EPA review function has changed slightly to one of having to make a disapproval.

obtained for a State-issued permit. Congress could, and did, have federal judicial review attach to the one aspect of federal involvement in the otherwise entirely State proceeding.

Section 509(b) contains two separate provisions as to review of EPA's actions under Section 306, one of which would be without meaning under EPA's present interpretation. Section 509 (b) (1) (A) provides for review of standards of performance issued by EPA under Section 306. Section 509(b) (1) (E) also provides review of the Administrator's action in "approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306" (emphasis added). The only limitations to be promulgated under Section 306 are the new source standards, and Section 509(b) (1) (A) provides for review of those standards. The only approval by the Administrator would be of effluent limitations fixed by a State in a permit, under a State implementation plan. If Section 509(b) (1) (E) does not refer to federal approval of State-initiated limitations, it is meaningless.

Section 309 also contains several references to effluent limitations which implement Section 301, but in Section 309 the references to the presence of the limitations in State permits are explicit. Section 309(a) (1) refers to a

violation of any condition or limitation which implements section 301, 302, 306, 307, or 308 of this Act in a permit issued by a State under an approved program under section 402 of the Act . . . (emphasis added).

See also Sections 309(a)(3), 309(c)(1), 309(d) (all of which refer to limitations in permits issued "by the Administrator or by a State"). These references show beyond doubt that States, and the Administrator as well, are to place the effluent limitations in permits, and that necessarily such limitations apply only to the effluent discharge restricted by the permit.

In short, the language of Section 509 was carefully drafted by Congress to take account of the special place effluent limitations were to have in the statutory scheme. Since effluent limitations under Section 301 were not to be "promulgated" through regulations issued by EPA, the "approving" language had to be inserted in Section 509(b)(1)(E) to provide for judicial review of EPA's action in reviewing effluent limitations contained in proposed State permits forwarded to EPA under Section 402(d).^{1/} Where EPA itself had the permit-issuing authority, federal judicial review in the Courts of Appeals of the effluent limitations

^{1/} Section 509(b)(1)(D) carefully distinguishes review of EPA's determination as to a State program from review of EPA's action in approving limitations fixed in State permit proceedings under Section 509(b)(1)(E).

in the permit was provided by Section 509(b) (1) (F) which deals with action by the Administrator in issuing or denying any permit under Section 402.

We have pointed out the legislative history which confirms that Congress intended the objectives set out in Section 301(b) to be achieved by the issuance of guidelines under Section 304(b), to be used by the permit authorities in fixing limitations in individual permits. See pages 14-16, supra. There is, in fact, no direct statement in the legislative history affirming the authority of EPA to issue regulations under Section 301 or commenting on the consequences for the remainder of the statute of an interpretation which in effect obliterates a major provision--Section 304(b)--from the law.

D. EPA's Contention That It Has Authority To Issue Regulations Under Section 301 Establishing Limitations Is Based On A Construction Which Would Create By Implication A Massive New Criminal Code

Section 309(c) of the Act (33 U.S.C. § 1319(c)) provides for criminal penalties for violation, inter alia, of Section 301 or any limitation in a permit issued under Section 402. EPA's construction would create by implication a massive new criminal code, for the regulations providing limitations under Section 301 would be criminally enforceable. Indeed, the Natural Resources

Defense Council urges this as a reason the Court should imply from the statute the authority to issue regulations under Section 301. NRDC Reply Brief in Natural Resources Defense Council, Inc. v. EPA, No. 74-1258, at 7-9, 13. Not only is this contention contrary to the canons of construction that Congress must leave nothing to implication so far as criminal penalties are concerned, it is nonsense if one examines the statutory plan.

Under Section 301(a) all discharges not covered by a permit are unlawful. If a discharger has a permit application pending he is not in violation for discharges prior to December 31, 1974; if he has a permit, compliance with the permit is compliance with Section 301. Section 402(k) (33 U.S.C. § 1342(k)). If he has no permit any discharge violates Section 301(a) regardless of the nature of the discharge.

There is no place in the scheme of enforcement for criminal penalties for violation of limitations established by regulations under Section 301. It cannot be suggested that there can be a criminal violation of the regulation during the period a permit is being considered, since the statute says the pending permit constitutes compliance. There can be no violation if permit conditions are different from the limitations in the regulation because compliance with the permit is compliance with Section 301.

But there will be differences between permits and the regulations because EPA has issued many permits before the regulation limits were published and it may well change the regulations. What is the status of criminal sanctions against the permittee in such a situation?

Moreover, limitations by regulation would modify without any statutory basis the absolute prohibition in Section 301(a) on discharges without a permit. Does that mean there would be a new criminal offense created for violation of the regulations in addition to that under Section 301(a) or is the Section 301(a) prohibition supplanted by the different prohibition under the regulations?

The regulations, moreover, provide no dates when they become effective. While they use terms associated with the 1977 standard and the 1983 standard, they are on their face effective on publication as limitations if EPA is correct. It does no good to say that EPA will not seek criminal sanctions for violation. The issue is whether a new criminal code with gross uncertainties as to dates of application can be created. Furthermore, as NRDC has said, if there are limitations they can be enforced by citizen's suits regardless of EPA's views.

Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra (Addendum B),

never addressed this question. He recognized that both EPA's and Petitioners' interpretation "find support in the statute and its history" (Addendum B at 9-10) but concludes that "taken as a whole" the authority to issue limitations by regulation under Section 301(b) is "implicit" or "implicitly supported" by the provisions of the Act (id. at 10). Had Judge Turk focused on the consequences so far as criminal law is concerned, he would have recognized that contrary to the canons of construction he has created a new criminal code by implication. As the Supreme Court has repeatedly said:

" . . . when choice has to be made between two readings of what conduct Congress had made an issue, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." United States v. Universal Corp., 344 U.S. 218, 221-222 (1952).

Toussie v. United States, 397 U.S. 112, 122 (1970).

To create this uncertainty about criminal sanctions by an interpretation based on implication is contrary to all canons of construction. Indeed, the need for criminal sanctions is defensible only when it is applied to one who discharges in violation of the clear prohibition in Section 301(a) or when it is

applied for violations of limitations which apply specifically to and are known to the individual discharger by virtue of their existence as a condition in a permit. None of these problems arise if, as Petitioners contend, there are guidelines under Section 304(b), since enforcement then would be only for violation of a limitation in a permit.

II. THE REGULATIONS ESTABLISHING EFFLUENT GUIDELINES
DO NOT COMPLY WITH THE STATUTORY REQUIREMENTS

A. EPA Has Failed To Specify Factors Relevant
To The Actual Application Of Technology As
Required By Section 304(b)

The tire and inner tube plants guidelines at issue here consist of a single number representing the number of pounds of each controlled pollutant parameter which may be discharged per thousand pounds of raw materials used. Except for the extremely limited "variance" provision described infra, which is applicable to the 1977 guidelines only, the guidelines provide absolutely no guidance to the permit-granting authority in applying them to plants having different ages, operating characteristics, processes and other pertinent factors. This failure on the part of EPA to specify guidelines in terms of ranges of value and factors relevant to the actual application of technology is directly contrary to the requirements of the Act.

To comply with the Act, guidelines regulations must first identify the degree of effluent reduction attainable through (for 1977) "the best practicable control technology currently available for classes and categories of point sources. . . ." Section 304(b) (1) (A). For 1983 the guidelines must identify the reduction attainable through application of "best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources. . . ." Section 304(b) (2) (A).

These provisions clearly envision regulations identifying the ranges of effluent reduction levels achievable by applying effluent control to existing plants:

In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. . . . In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.

* * *

The Administrator should establish the range of best practicable levels based

upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468 (emphasis added). Congress underlined that purpose by directing that the regulations, in addition to identifying achievable effluent reductions, "shall . . . specify factors to be taken into account in determining control measures and practices to be applicable to point sources" within the categories and classes the EPA was directed to establish. Section 304(b)(1)(B) (emphasis added).

As regards the 1983 guidelines, there can be no doubt as to this intention, for EPA is directed to specify factors in "determining the application of the control measures applicable "to any point source" within the classes or categories. Section 304(b)(2)(B). EPA, for the 1983 effluent guidelines, can look to the best performers or performer in an industry for a reference point in specifying the range of achievable effluent reductions. S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468. But EPA's responsibility to specify the factors to be taken into account in establishing the requirements for a particular plant remains clear and unequivocal.

Congress actually listed in Section 304(b) the specific factors that must be considered and elaborated by EPA in the regulations:

(i) The cost, and for the 1977 guidelines the cost in relation to the benefits to be achieved: these are vital determinations, since Congress made it clear that it did not intend EPA to require effluent reduction solely for the sake of effluent reduction without reference to the costs involved as they affect both the industry and the economy as a whole.

(ii) "Age of equipment and facilities": this is a factor of obvious importance in assessing the practicability and availability of technology that might require total reconstruction of older plants. This factor is of decisive importance in the tire and inner tube industry; EPA's failure to consider this factor is discussed in Petitioners' Brief in No. 74-1809.

(iii) "The process employed" and "process changes": Congress recognized, as the record in the present proceedings makes abundantly clear, that there are variations in process with respect to each product or category and that process characteristics have a great impact on waste treatment possibilities.

(iv) "The engineering aspects of the application of various types of control techniques": the statutory intent is that EPA deal not only with the type and age of plant but with climatic

conditions, availability of land and similar factors that have a direct bearing on the technology that can be applied and on the cost in relation to the benefits;

(v) "Non-water quality environmental impact (including energy requirements)": Congress recognized the futility of damaging the air or the land, or of making undue claims on the Nation's scarce energy resources, to achieve water quality benefits without a careful balancing of the interests involved, thus requiring EPA to consider the comparative environmental benefits and hazards from increased generation of power, from the production and deposit of solid wastes, from possible increases in air pollution and from the impact of the pollution control facilities on surrounding areas.

It is clear why Congress was so detailed and exact in specifying what should go into the guideline regulations. Given the policy of State-Federal partnership, and hence over fifty potential permit-issuing authorities, the permit authorities need regulations specifying not only attainable effluent reduction based on an appropriate technology but the factors to be determinative in deciding how the technology should be applied to achieve uniformity, i.e., similar treatment of plants with similar characteristics.^{1/}

^{1/} Judge Turk in his opinion in E.I. du Pont de Nemours & Company, et al. v. Russell E. Train, et al., supra, concluded that the statute "appeared to contemplate (continued on next page)

In the introduction to the guidelines, EPA acknowledged that Congress intended that it issue guidelines with "some flexibility" to take into account the complexities of the specified plant situations. 39 Fed. Reg. 6661, App. 2838. Yet EPA did not, as the statute explicitly demands, specify in the guideline regulations the factors to be considered in accounting for these complexities. Instead of following the congressional mandate, EPA has simply fixed a single number limiting discharges without any elucidation as to statutory factors, and purports to permit departure from these single numbers only if it is shown for a given plant that the "factors" applicable to it are "fundamentally different from the factors considered is the establishment of the guidelines." 40 C.F.R. § 428.12, App. 2839. EPA did not incorporate such a provision into the 1983 guidelines regulations. See 40 C.F.R. § 428.13, App. 2840.

Apart from EPA's broad statement that it considered all of the statutory factors (Preamble to Proposed Regulations, App. 2784-89), the guidelines regulations provide no clue to a reviewing court or to the permit-issuing authorities that enables identification of key factors bearing on the practicability of control technology or determination of what consideration was given to such factors. Consequently, there is no guidance

^{1/} (continued from page 53) the incorporation of such factors in the effluent limitations under section 301, which was done in this case." Addendum B at 15. However, the judge did not resolve the issue, holding that this was a challenge to the Administrator's action in issuing effluent limitations under Section 301 and should be pursued in the Court of Appeals under Section 509 (b) (1) (E). Id.

in the regulations to the permit-issuing authorities as to what standard should be applied to determine if certain factors are "fundamentally different" from those considered by EPA.^{1/}

EPA apparently has recognized the ambiguities of the approach it adopted and its potential shortcomings as a substitute for the statutorily mandated regulatory mechanism. On August 2, 1974, EPA published a notice inviting public comment "on the necessity for the variance clause and the manner in which it should be interpreted and applied." 39 Fed. Reg. 28926-27.

Petitioners agree with EPA that Congress intended "some flexibility" in the guidelines. Had EPA followed the statute and included in its regulations the factors bearing on the application of the technology, the "flexibility" foreseen by Congress would have been incorporated in the guidelines.

B. EPA's Approach To Establishing Industry Classes and Categories Was Improper

Sections 304(b)(1)(A) and (B) (1977 guidelines), and 304(b)(2)(A) and (B) (1983 guidelines), all speak of "classes and categories of point sources." What Congress had in mind, obviously, was that the regulations issued under those subsections

^{1/} The Draft Development Document and the Development Document prepared by EPA respecting the rubber processing guidelines and standards is not part of the regulations.

were to identify the effluent reduction attainable through appropriate treatment technology for both 1977 and 1983 and to specify the factors to be taken into account in applying that technology, on a basis which reflected not only the major industrial "categories" but also "classes" within such categories.

The prime difficulty with EPA's approach to classification is that it tried to use the step to accomplish too much. EPA used the factors only to establish the "classes" or subcategories within the rubber processing industry, and then dispensed with any specification of the factors in the regulations. See Draft Development Document, App. 2598. This approach cannot be sanctioned under the Act because the Act flatly requires that the specification of factors, just like the identification of effluent reduction, be made on a "classes and categories" basis.

Further, the classification step cannot possibly take into account the cost-benefit balance, non-water environmental impact, and energy requirements as required under Section 304 (b) (1) (B) and (b) (2) (B). These factors, along with the others listed, must be specified and elaborated in the regulations implementing Section 304 (b) for application in permit proceedings under Section 402.

Moreover, EPA's methodology did not include the cost-benefit analysis required by the Act. Overall, EPA is required in the 1977 guidelines regulations to identify "the degree of effluent reduction attainable through the application of the best practicable control technology currently available." Section 304(b)(1)(A) (emphasis added). A technology is not "practicable" unless its cost is commensurate with the benefit to be obtained. Accordingly, EPA had to conduct an overall cost-benefit analysis to arrive at the effluent reduction identified in the regulations. Secondly, Section 304(b)(1)(B) requires the regulations to specify and elaborate a cost-benefit factor to be used in applying the effluent reduction aspect of the guidelines to a particular plant. EPA is required to take into account a "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." Section 304(b)(1)(B). The legislative history further defines "total cost":

The term "total cost of application of technology" as used in section 304(b)(1)(B) is meant to include those internal, or plant, costs sustained by the owner or operator and those external costs, such as potential unemployment, dislocation, and rural area economic development sustained by the community, area or region.

118 Cong. Rec. 9117 (daily ed. Oct. 4, 1972) (Congressman Jones of Alabama, referring to the Statement of the Managers, House Debate on Conference Report), Legislative History 231.

EPA obviously did not specify or elaborate the cost-benefit factor to be made a part of the regulations, because it did not specify any of the factors.

For the 1983 guidelines Section 301(b)(2) also requires the requisite technology to be "economically achievable" and Section 304(b) requires EPA to consider the "cost" in promulgating the corresponding guidelines.

EPA failed to comply with these statutory requirements in promulgating effluent guidelines. In lieu of the careful consideration of cost factors required by the Act, EPA gave the question of costs only the most superficial attention. EPA's cursory approach to the subject of costs is highlighted in the preamble to the final regulations wherein EPA stated that it made a general identification of the costs required to achieve the effluent reductions identified, but that it could not make a firm cost-benefit analysis:

(d) Cost-Benefit Analysis

. . . It is not feasible to quantify in economic terms, particularly on a national basis, the costs resulting from the discharge of these pollutants to our Nations' waterways.

* * *

Implementing the effluent limitations guidelines will substantially reduce the environmental harm which would otherwise be attributable to the continued discharge of polluted waste waters from existing and newly constructed plants in the rubber processing industry. The Agency believes that the benefits of thus reducing the pollutants discharged justify the associated costs which, though substantial in absolute terms, represent a relatively small percentage of the total capital investment in the industry.

39 Fed. Reg. 6661-62, App. 2838-39 (emphasis added).

EPA failed to make an adequate practicability or cost-benefit analysis for the identified effluent reduction for the tire and rubber plant subcategory, and as a result required reduction of pollutants to the guideline level even though the cost of attaining the reductions far outweighs any benefit. Also, as a general matter, those costs which EPA did identify are incomplete; excluded from consideration were costs associated with land acquisition and in-plant modifications. This is discussed further in Petitioner's Brief in No. 74-1809.

C. In Formulating The 1977 Guidelines, EPA Improperly Identified Effluent Reduction Based Upon A Nonexistent "Model" Plant

For each of the "classes and categories of point sources," Sections 304(b)(1)(A) and (B) and Section 304(b)(2)(A) require EPA to identify in the guideline regulations the degree of effluent

reduction attainable through the application of the technology appropriate for either 1977 or 1983. One of the critical factors which EPA must consider and elaborate on in the regulations is the "engineering aspects of the application of various types of control techniques." Sections 304(b)(1)(B) and (b)(2)(B) (emphasis added).

EPA's methodology, in fact, in developing the guidelines for the rubber tire and inner tube industry was to obtain limited data on only nine (App. 192) of the 56 plants in the industry (App. 2508), but then to base the single number guidelines not even on the performance of any plant but rather on artificial and inaccurate hypotheses about a "typical" plant and a "model" technology. The record is sparse as to how EPA determined what constituted a "typical" plant, and the model technology is not in use anywhere in the industry. Moreover, EPA's analysis did not discuss the application of that technology to actual plants.

The Act on its face demands far more of EPA. The legislative history emphasizes that Congress expected EPA to apply its expertise and judgment, not merely to write broad-reaching regulations on supposed technology without assessment of the technical and economic merits of that practice and its applicability to a representative segment of the industry.

Respecting the 1977 guidelines, the report of the Senate Public Works Committee states:

In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level.

The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category. It is acknowledged that in those industrial categories where present practices are uniformly inadequate, the Administrator may determine best practicable to require higher levels of control than any currently in place if he determines the technology to achieve those higher levels can be practicably applied.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468 (emphasis added). In determining the levels making up the range for each subcategory of the 1977 effluent guidelines, the legislative history shows that the starting point is industry-wide performance within the relevant subcategory. Congress indicated that the only exception was for "those industrial categories where present practices are uniformly inadequate. . . ." S. Rep. 92-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468. The Contractor made a conclusory finding here, which was not

expressly adopted by EPA, that "no adequate overall control and treatment technology is employed by plants within the [tire and inner tube] industry." Contractor's Report, App. 11; Draft Development Document, App. 2557. The Contractor's conclusion, however, was reached after examination of only nine plants in the industry, less than one-sixth of the total, and hardly sufficient to support the required finding that "the present practices are uniformly inadequate." Furthermore, even if EPA had properly concluded, based on an adequate analysis of the industry, that the industry practices were uniformly inadequate, technology proposed in its place must still independently meet a criterion of viability:

By the term "currently available" the Committee means a control technology, which, by demonstration projects, pilot plants, and general use, has demonstrated a reasonable level of engineering and economic confidence in the viability of the process at the time of commencement of actual construction of the control facilities.

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 101 (1972), Legislative History 788 (emphasis added). In short, technology not in general use may be taken into account when industry practice is uniformly inadequate, but even in such a case the legislative history indicates that such technology must be based on demonstration projects and pilot plants and not only on laboratory experiments or theoretical postulations.

In all circumstances, however, the point of departure must be a survey of at least a representative sampling, if not

all, of existing performance within the relevant industrial category (since no determination otherwise could be made that such performance is "uniformly inadequate"). Any determination of the 1977 "best practicable"-based effluent reduction which rested on a survey of less than a representative sampling of all existing plants within the affected category would not be in compliance with the Act. Similarly, any specification of the 1977 range of values for effluent reduction that was not based on an average of the best existing performance by plants of similar size, age and unit process within the category in question would not comply with Section 304. Thus, a specification of the 1977 effluent reduction based on performance by a nonexistent "model" plant -- as was done for the tire and inner tube subcategory -- is not in conformity with Congress' intention.

The legislative history also leaves no doubt that the 1977 "best practicable"-based effluent reduction involves only control and treatment measures applied to waste waters after they leave the manufacturing process. EPA consequently is not authorized to specify a degree of effluent reduction for an industry category in the 1977 guidelines if attainment of that degree of effluent reduction depends on in-plant process changes or on measures applied within the plant apart from the point of discharge to the navigable waters. As the report of the House Public Works Committee said:

By the term "control technology" the Committee means the treatment facilities at the end of a manufacturing, agricultural or other process, rather than control technology within the manufacturing process itself.

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 101 (1972), Legislative History 788 (emphasis added). And further:

When the term "best available demonstrated technology" is used, the Committee intends that this shall apply to the totality of the point source. By this, it is meant in contrast to the term "best practicable control technology currently available", that the total plant is being considered and that "best available demonstrated technology" does not apply solely to the control techniques used at the actual discharge of the point source. This is a basic difference between the best available demonstrated technology in the January 1, 1981 [now 1983] requirement and the best practicable control technology currently available in the January 1, 1976 [now 1977] requirement.

Id. at 102-103, Legislative History 789-790.

For the tire and inner tube plants subcategory of the Rubber Processing Industry, EPA based its guideline on a technology requiring total segregation of sewers, which will necessitate replumbing numerous older plants. The reconstruction of plant facilities thus required by EPA is far more than the end-of-the-pipe treatment on which the Act permits EPA to base the 1977 guidelines. This issue is discussed further in Petitioners' Brief in No. 74-1809 at 32-46.

D. The 1983 Guidelines Are Not Based On "Best Available" Technology Within The Meaning Of The Act

As in the case of the 1977 guidelines, Section 304(b) of

the Act and the legislative history show that the 1983 guidelines are to be determined upon evaluation of a variety of considerations, after a survey of the entire range of actual performances in the affected industry subcategory. Again the degree of effluent reduction identified in the guidelines should be expressed as a range of values. However, the 1983 guidelines may be based upon a single best performing plant in a relevant subcategory, rather than on the average:

In making the determination of "best available" the Committee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above, except that rather than the range of levels established in reference to the average of the best performers in an industrial category the range should at a minimum be referenced to the best performer in any industrial category.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Legislative History 1468 (emphasis added).

The technology underlying the 1983 guidelines must be "available" or, ordinarily, in use at one plant in the industry. However, the legislative history indicates that the technology need not always be in actual use. If it is not in actual use in the industry, the technology must have been "demonstrated" to be viable for the relevant industry. In describing the Senate bill, S. 2770, 92d Cong., 1st Sess. (1971), which used the term "best available control technology" for the Section 306 new source standards, the Senate Public Works Committee report explained:

As used in this bill the concept "best available control technology" is intended to mean that the Administrator should examine the degree of effluent control that has been or can be achieved through the application of technology which is available or normally can be made available. This does not mean that the technology must be in routine use somewhere. It does mean that the technology must be available at a cost and at a time which the Administrator determines to be reasonable, and that the technology has been adequately demonstrated if not routinely applied.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 51-52 (1971), Legislative History 1469-70 (emphasis added). Thus, in describing the technological basis for the 1983 effluent guidelines, the House conference managers stated that Congress meant "those plant processes and control technologies which, at the pilot plant or semi-works levels, have demonstrated both technological performance and economic viability sufficient to reasonably justify the making of investments in new production facilities." 118 Cong. Rec. 9118 (daily ed. Oct. 4, 1972) (Congressman Jones of Alabama referring to the Statement of the Managers, House Debate on Conference Report), Legislative History 232.

The 1983 guidelines for tire and inner tube plants fail to meet this standard of availability. Far from being demonstrated to have either technological performance capability or economic viability, EPA's technological model has not been tested at even the laboratory level on waste from tire and inner tube plants. Its technological characteristics are thus entirely conjectural,

and necessarily its economic viability is equally uncertain. The Court is respectfully referred to Petitioners' Brief in No. 74-1809 at 42-46 for further discussion of the shortcomings of EPA's speculative technological model.

III. THE JUDICIAL REVIEW ROLE OF THE COURTS

The petitions involving the guideline regulations present a series of complex legal and technical issues for the Court's resolution. Furthermore, the legal issues of the proper construction to be given the sections respecting effluent guidelines in the Federal Water Pollution Control Act are novel ones. The only decisions on any of these issues have been rendered by United States District Courts in the Western District of Virginia and the District of Columbia (see page 5, supra), but neither of those opinions deals fully with the issues raised here.

If this Court determines that it does have the power to review the EPA effluent guideline regulations at issue here, the standard of review is that prescribed by Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706):

The reviewing court shall --

* * *

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right

In carrying out a similar congressionally mandated judicial review function respecting provisions of the Clean Air Act, as amended, where legal and technical issues were also intertwined, Judge Leventhal noted that:

[T]he necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the agency "has exercised a reasoned discretion" We cannot substitute our judgement for that of the agency, but it is our duty to consider whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement' Ultimately, we believe, that the cause of a clean environment is best served by reasoned decision-making.

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973) (emphasis added). To serve this judicial review function, courts have obliged EPA to provide a statement of reasons and a rationale for its regulatory decisions, such that "the basis for . . . [its] decision [will] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1100 (D.C. Cir. 1970). See also

Dry Color Mfrs. Ass'n, Inc. v. Department of Labor, 486 F.2d 98, 105-107 (3d Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972).

The need for careful judicial review of regulatory decisions such as those reflected in EPA's effluent guidelines regulations is not difficult to discern. A check on the agency given broad regulatory powers affecting the economy is essential, and congressional oversight cannot serve to fulfill this function on a regular basis. Consequently, and not surprisingly, the job has been openly thrust upon the courts. In many ways, as appears from this and the associated brief, these actions provide a full sampling of all the resulting judgments which must be made by such a reviewing court.

CONCLUSION

The Court should dismiss the petitions relating to guideline regulations on the ground that it lacks jurisdiction in this proceeding to review regulations under Section 304(b). Should the Court conclude that it has jurisdiction to review these regulations, it should set the regulations aside and remand

them to EPA with the direction that EPA comply with the statute and issue regulations in conformity with Section 304(b).

Respectfully submitted,

ROBERT C. BARNARD

DANIEL B. SILVER

JOHN D. FIELD, III

ATTORNEYS FOR PETITIONERS

Cleary, Gottlieb, Steen & Hamilton

1250 Connecticut Avenue, NW

Washington, DC 20036

(202) 223-2151

OF COUNSEL:

CLEARY, GOTTLIEB, STEEN & HAMILTON

1250 Connecticut Avenue, NW

Washington, DC 20036

Dated: October 2, 1974

ADDENDUM A

The pertinent provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 et seq., are as follows:

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281 (g) (2) (A) of this title.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste

(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844.

§ 1312. Water quality related effluent limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b) (2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) (1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

June 30, 1948, c. 758, Title III, § 302, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 846.

§ 1314. Information and guidelines—Criteria development and publication

(a) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

Effluent limitation guidelines

(b) For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, published within one year of October 18, 1972, regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

Pollution discharge elimination procedures

(c) The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

Secondary treatment information; alternative waste treatment management techniques and systems

(d) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1281 of this title.

Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

(e) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from--

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

Guidelines for pretreatment of pollutants

(f) (1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

Test procedure guidelines

(g) The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

(h) The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.)

Restoration and enhancement of publicly owned fresh water lakes

(i) The Administrator shall, within 270 days after October 18, 1972 (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

Agreements with Secretaries of Agriculture, Army, and Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations

(j) (1) The Administrator shall, within six months from October 18, 1972, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title.

(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out appropriate programs authorized to be carried out by such Secretaries.

(3) There is authorized to be appropriated to carry out the provisions of this subsection, \$100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974. June 30, 1948, c. 758, Title III, § 304, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 850.

§ 1316. National standards of performance—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

Categories of sources; Federal standards of performance for new sources

(b) (1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;
- feedlots;
- electroplating;
- organic chemicals manufacturing;
- inorganic chemicals manufacturing;
- plastic and synthetic materials manufacturing;
- soap and detergent manufacturing;
- fertilizer manufacturing;
- petroleum refining;
- iron and steel manufacturing;
- nonferrous metals manufacturing;
- phosphate manufacturing;
- steam electric powerplants;
- ferroalloy manufacturing;
- leather tanning and finishing;
- glass and asbestos manufacturing;
- rubber processing; and
- timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

State enforcement of standards of performance

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

Protection from more stringent standards

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

Illegality of operation of new sources in violation of applicable standards of performance

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

June 30, 1948, c. 758, Title III, § 306, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 854.

§ 1317. Toxic and pretreatment effluent standards; establishment; revision; illegality of source operation in violation of standards

(a) (1) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section. The Administrator in publishing such list shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

(2) Within one hundred and eighty days after the date of publication of any list, or revision thereof, containing toxic pollutants or combination of pollutants under paragraph (1) of this subsection, the Administrator, in accordance with section 553 of Title 5, shall publish a proposed effluent standard (or a prohibition) for such pollutant or combination of pollutants which shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and he shall publish a notice for a public hearing on such proposed standard to be held within thirty days. As soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based upon a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

(3) If after a public hearing the Administrator finds that a modification of such proposed standard (or prohibition) is justified, a revised effluent standard (or prohibition) for such pollutant or combination of pollutants shall be promulgated immediately. Such standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case more than one year from the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) (1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

June 22, 1948, c. 758, Title III, § 307, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 856.

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, or 1318 of this title in a permit issued by a State under an approved permit program under section 1342 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

State liability for judgments and expenses

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859.

§ 1363. Citizen suits—Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation

under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Notice

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; Intervention by Administrator

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Litigation costs

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Effluent standard or limitation

(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlaw-

ful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

Citizen

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

Civil action by State Governor

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. June 30, 1948, c. 758, Title V, § 505, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 888.

§ 1368. Administrative procedure and judicial review

(a) (1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(c) of this title, the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpoenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpoena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b) (1) (C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence. June 30, 1948, c. 758, Title V, § 509, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 891, and amended Dec. 23, 1973, Pub.L. 93-207, § 1(6), 87 Stat. 906.



ADDENDUM B

U.S. DIST. COURT
AT ROANOKE, VA.

FILED

SEP 27 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOYCE F. WITT, CLERK

By: *[Signature]*

E. I. DUPONT DE NEMOURS) CIVIL ACTION NO. 74-57
and COMPANY, et al,)

Plaintiffs,) OPINION and ORDER

v.)

) BY: James C. Turk, Chief U. S.
District Judge

RUSSELL E. TRAIN, et al,)
Defendants.)

This suit is brought by eight chemical manufacturers seeking declaratory and injunctive relief against the Administrator and Deputy Administrator of the Environmental Protection Agency (EPA). The case is presently before the court pursuant to plaintiffs' motion for partial summary judgment and declaratory judgment and the defendants' motion to dismiss for lack of subject matter jurisdiction or alternatively to stay the proceedings.

Plaintiffs ultimately seek to have this court enjoin and set aside certain regulations promulgated by the Administrator of the EPA governing the effluent discharge of sulfuric acid plants on grounds that they are arbitrary, capricious, not supported by substantial evidence, beyond the statutory authority of EPA and not in accord with procedures of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq ("The Act") and the Administrative Procedure Act. Resolution of these allegations requires factual determinations and they are accordingly not now ripe for disposition. However, plaintiffs also raise several issues of statutory construction not dependent upon factual determinations and which may result in the disposition of the case at this time. The following issues are now before the court for resolution:

1. Whether the Administrator of the EPA has the authority under section 301(b) of the Act to issue regulations establishing effluent limitations for sulfuric acid plants;
2. Whether the regulations in question conform to section 304(b) of the Act and the notice and public participation provisions of the Administrative Procedure Act; and
3. Whether this court has jurisdiction to review the regulations in question and the procedures by which they were promulgated, or whether as defendants contend, this suit should be dismissed for lack of subject matter jurisdiction.

THE STATUTE

The Federal Water Pollution Control Act Amendments of 1972, while technically amending the Federal Water Pollution Control Act of 1965, 33 U.S.C. §§ 1151 et seq., is in effect a comprehensive statute in its own right. Section 101(a) of the Act states as its objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and states as two of its goals "that the discharge of pollutants into the Navigable waters be eliminated by 1985" and "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Of primary interest to this suit are sections 301, 304 and 402, which establish the regulatory framework for achieving the above goals and section 509(b) (1) providing for judicial review of the Administrator's actions.

Section 301(a) makes it unlawful for any person to discharge any pollutant except as in compliance with certain enumerated sections of the Act including section 301. Section 301(b) then states:

"In order to carry out the objective of this Act, there shall be achieved--

"(1) (A) not later than July 1, 1977, effluent limitations for point sources... (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act....

"(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources...which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act...."

Section 304(b) to which section 301(b) refers provides:

"For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall--

"(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources; and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources...within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 301 of this Act shall include consideration of the total cost of application of

technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

"(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources...; and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 301 of this Act to be applicable to any point source... within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants."

The statutory scheme further provides for a national system of discharge permits known as the "National Pollutant Discharge Elimination System" (NPDES) to insure that the control levels established by the Act are achieved. Thus, section 402(a) (1) states:

"Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for a public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of the Act."

Section 402(b-c) further provides that the permit issuing authority be given to the individual states which submit a program which meets the requirements of the Act, although the Administrator retains the power to prevent the issuance of a permit he deems to be "outside the guidelines and requirements of this Act." § 402(d)(2).

Section 509(b) provides for judicial review of the Administrator's determinations:

"(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(c), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a state permit program submitted under section 402(b), (E), in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance, or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

THE REGULATIONS

On August 6, 1973, the EPA published notice of proposed rulemaking "with respect to effluent limitations guidelines, standards of performance and pretreatment standards for new sources." 38 Fed. Reg. 21202. On October 11, 1973, EPA published notice of proposed rulemaking for 40 C.F.R. Part 415, "Effluent Limitations Guidelines and Standards of Performance and Pretreatment for Inorganic Chemicals Manufacturing Point Source Category." 38 Fed. Reg. 28174 et seq. These proposed regulations subdivided the inorganic chemicals manufacturing category into twenty-two sub-categories, each representing a different chemical, including sulfuric acid. With respect to sulfuric acid, the

proposal discussed the three principal methods of manufacture - double absorption plants, single absorption plants and spent acid plants - and stated that the proposed regulations would not apply to spent acid plants. However, the proposed regulations for both single and double absorption plants established the standard of "no discharge of process waste water pollutants to navigable waters" both "after application of the best practicable control technology currently available" and "after application of the best available technology economically achievable." 38 Fed. Reg. 28192. After receiving additional comments, including comments from seven of the plaintiffs to this suit, 39 Fed. Reg. 9612, final regulations were issued on March 12, 1974 for 40 C.F.R. Part 415 (Inorganic Chemicals Manufacturing Point Source Category). The Administrator declined to change the basic proposed regulations for sulfuric acid production, and the "no discharge of process waste water pollutants" went into effect. 40 C.F.R. §§ 415.212, 415.213, 39 Fed. Reg. 9634. The proposed regulations for sulfuric acid production (as well as other subcategories in the Inorganic Chemicals Manufacturing Group) were modified with regard to the limitations representing best practicable control technology currently available (40 C.F.R. § 415.212), by providing that the "no discharge" standard might be adjusted for certain plants by the Regional Administrator or the State in issuing an NPDES permit; according to the regulation, such an adjustment could be made on the basis of a showing that certain factors peculiar to the discharger are "fundamentally different" than the factors considered in formulating the regulation. 40 C.F.R. § 415.212, 39 Fed. Reg. 9634.

Plaintiffs' statutory construction argument is essentially that the regulations for sulfuric acid plants are not valid effluent "guidelines" complying with the requirements of section 304(b). They contend that the word "guidelines" in section 304(b) is a term of art which contemplates the administrative promulgation of broadly outlined regulations to serve as a starting point for the development of specific restrictions which would then be individualized for each discharger by way of permits issued by the Regional Administrator or State pursuant to § 402 with such permits embodying the "limitations" to be "achieved" pursuant to § 301. In support of this construction plaintiffs note that § 304(b) requires that the guidelines to be published as regulations contain two elements: (1) the degree of effluent reduction "attainable" by 1977 using the "best practicable control technology currently available" and by 1983 using the "best available control measures and practices achievable" for classes and categories of point sources; and (2) a specification of the factors to be taken into account in determining the control measures applicable to point sources within such categories or classes in order to attain these goals. Thus plaintiffs argue that the regulations were intended to be flexible guidelines and not prescriptive rules applicable across the board to all plants in a given category (i.e. sulfuric acid plants); and the permit granting agency would look to the guidelines for determining the degree of effluent limitation attainable for a given plant.

Plaintiffs' specifically contend that the regulations for sulfuric acid plants fail to discuss the statutory factors and hence provide no guidance to the permit-granting authorities. Furthermore, they contend that the EPA's construction and implementation of the Act would frustrate the intent of Congress in allowing the States to play a major role in implementing the Act. They argue that by making the

regulations binding prescriptions in the form of specific limitations instead of a "range" of discharge levels together with factors to be taken into account for discrete industrial categories, the EPA has deprived the States of discretion in administering the NPDES program. This is said to be contrary to the intent of Congress expressed in § 101(b) of the Act "to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution...."

Based on their construction of the Act, plaintiffs then contend that review in the Court of Appeals pursuant to § 509(b)(1) of the Act is not available to challenge the regulations constituting effluent guidelines under § 304(b). Since § 509(b) provides only for review of EPA actions under sections 301, 302, 306, 307 and 402 of the Act, review of other regulatory actions by the EPA as well as certain other agencies empowered to act under the Act would proceed under the Administrative Procedure Act, 5 U.S.C. § 702, through other jurisdictional statutes such as the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361.¹ Thus plaintiffs argue that review of § 304(b) guidelines is not encompassed by § 509(b). In support of this position, plaintiffs point out that each of the sections specified in § 509(b) allow regulatory actions by the EPA which may then be enforced by the Administrator pursuant to § 309 or by "any citizen" pursuant to § 505 by way of a civil suit in the district court. They argue that actions taken pursuant to sections not specified in § 509(b), including guidelines issued pursuant to § 304(b), require further implementing steps, and hence a decision of broad precedential effect by a Court of Appeals was not deemed necessary in the first instance.

In contrast, defendants contend that the Act contemplates that the Administrator promulgate actual effluent limitations which will then be uniformly applied by the Administrator or the states in issuing NPDES permits under section 402. According to their construction, section 304(b) guidelines have no direct relationship to permit proceedings under section 402, but merely provide a basis for establishing the effluent limitations. They accordingly argue that the regulations are effluent limitations properly established pursuant to section 301(b).

Defendants view the regulations in question, 45 C.F.R. §§ 415.212, 415.213, as valid effluent limitations promulgated pursuant to section 301(b) with the fixed number of zero for the discharge of process waste water from sulfuric acid plants being the established limitation. In addition they contend that 45 C.F.R. Part 415 establishes the "guidelines" required by section 304(b) by subdividing the inorganic chemical manufacturing group into 22 subcategories of specific chemicals². Thus defendants contend that the regulations are "guidelines" issued pursuant to section 304(b) by way of subcategorization, but are effluent limitations in terms of the specific numerical restrictions imposed.

On the basis of this construction, defendants argue that jurisdiction to review the regulations is exclusively in the Court of Appeals pursuant to section 502(b)(1)(E). Furthermore, it is asserted that since the "guidelines" are intertwined with and provide a definitional basis for the limitations, they should also be reviewed in the Court of Appeals.

II

The issue of statutory construction presented in this case is one of first impression³ in which the court must seek the intent of Congress from the words and structure of the statute and its legislative history. Although the varying interpretations of the Act presented by the parties both find support in the statute

and its history, for the reasons which follow the court concludes:

(1) that the Administrator was authorized to promulgate by regulation the effluent limitations in issue; (2) that the structural and content requirements of such regulations under section 304(b) were satisfied; and (3) that judicial review of these limitations and guidelines is exclusively in the Court of Appeals under section 509(b) (1) (E).

1.

Taken as a whole, the various sections of the Act support the defendants' construction that section 301(b) effluent limitations were intended to be promulgated as regulations apart from section 402 permit proceedings. This is implicitly supported by section 509(b) (1) (E) which provides for review of the Administrator's actions "in approving or promulgating any effluent limitation under section 301, 302, or 306...." The independence of such limitations is also implicit in section 505 which provides in subsection (a) for any citizen to sue for a violation of "an effluent standard or limitation under this Act"; but even more revealing is section 505(f) which defines "effluent standard or limitation under this Act" to include six separate definitions among which are: "(1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act, (2) an effluent limitation or other limitation under section 301 or 302 of this Act; ... or (6) a permit or condition thereof issued under section 402 of this Act...." Obviously under plaintiffs' construction of the Act the second definition quoted above would be redundant with the sixth. Plaintiffs have offered no explanation for this apparent inconsistency with their position.

Plaintiffs would avoid the implication of section 509(b) (1) (E) by construing the word "promulgating" in section 509(b) (1) (E) as applying only to section 302 and the word "approving" as having application to effluent limitations under sections 301 or 306. In support of this construction, plaintiffs point out that section 402(b) allows a state to develop a plan for issuing permits and thus displace

[B-10]

the Administrator's authority to issue permits; and further that section 402(d) provides a check on the states by allowing the Administrator to veto a permit issued by the state:

"(d) (1) Each state shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue... (b) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. (plaintiffs' emphasis).

From these sections, plaintiffs argue that the use of "approving" in section 509(b) (1) (E) was in reference to the Administrator's action in reviewing effluent limitations under section 301(b) or standards of performance under section 306⁴ which would be set by the States in permits. They further contend that such approval was a necessary element inasmuch as such a federal connection to a state program was necessary in order to justify review in the federal courts. On the other hand, plaintiffs argue that section 302⁵ provides for the promulgation of effluent limitations by the Administrator in certain defined situations without a provision for state implementation. This is said to explain the use of "promulgating" in section 509(b) (1) (E).

Such a construction of section 509(b) (1) (E) is unconvincing for several reasons. First, section 302 does not require that effluent limitations be "promulgated"; rather it states that "effluent limitations...shall be established." The court fails to see a distinction between the establishment of limitations under section 302 and the achievement of limitations under section 301(b) particularly in view of the language used in section 301(e):

"Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

Similarly section 302(c) provides: .

"The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act."

Second, plaintiffs' construction of the interrelationship between section 509(b) (1) (E) and section 402(d) (1) and (2) ignores the fact that sections 402(d) (3), 402(e) and 402(f) allow the Administrator to waive review of permits issued by the States, and thus in such situations, by plaintiffs' analysis, there would be no federal judicial review under section 509(b) (1). Finally, the reference to "guidelines and requirements of this Act" in section 402(d) (2) would appear to section 304(h) guidelines⁶ (as opposed to section 304(b) guidelines) in view of the references to "guidelines" in sections 402(b), 402(c) (1), and 402(c) (2) and 402(e) being specifically to section 304(h) guidelines.

Even more strongly suggestive of the conclusion that section 301(b) limitations were intended to be promulgated as regulations is the interrelationship between section 301(b) and 304(b). Thus the requirements of sections 304(b) (1) (A) and 304(b) (2) (A) that the Administrator publish regulations which identify the degree of effluent reduction attainable by 1977 and 1983 appears to contemplate the issuance of actual effluent limitations which are referred to in section 301(b) (1) (A) as being "defined by the Administrator pursuant to section 304(b) of this Act" and in section 301(b) (2) (A) as being "determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act...."

Both plaintiffs and defendants quote the definition of effluent limitation in section 502(11) in support of their respective interpretations of the Act:

"The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance. "

Plaintiffs argue that since a state cannot issue regulations the definition indicates that effluent limitations do not involve regulations and that the definition contemplates that both the states and the EPA will have a shared role in establishing effluent limitations. However, the court does not perceive this definition as being inconsistent with the defendants' construction of the Act and the regulations herein challenged since the effluent limitations promulgated by the Administrator may nevertheless be "established" for a given discharger through a permit issued by a state which has satisfied the requirements of section 402.

Further support for the conclusion that NPDES permits issued pursuant to section 402 would embody the effluent limitations previously established by the Administrator is implicit in the fact that section 402(a) requires that such permits meet the "applicable requirements under section 301" but omits any reference to section 304(b) guidelines.

As noted, the regulations herein challenged establish the number of zero as the effluent limitation for both single and double absorption plants. The court is of the opinion from a consideration of the structure and wording of the Act that the Administrator had the authority to promulgate such limitations under section 301(b) pursuant to his authority under section 304(b). It follows that plaintiffs' substantive challenge to such limitations must be brought in the Court of Appeals pursuant to section 509(b) (1) (B).

2.

Plaintiffs further challenge the regulations in question for failing to specify the factors to be taken into account in

determining the control measures and practices to be applicable to point sources within such categories or classes, as required by section 304(b) (1) (B) and 304(b) (2) (B). As noted, defendants argue that the subcategorization in effect establishes "guidelines" under section 304(b). They contend that variations in plant age, size, manufacturing processes, raw materials etc. (section 304(b) (1) (B) and 304(b) (2) (B) factors) were taken into account by such subcategorization. They further argue that this approach is consistent with the statutory scheme and facilitates the achievement of reasonably uniform limitations for similar point sources under section 301 of the Act.

The court notes that although the factors were not set forth as regulations as such, the regulations do indicate that the factors were considered. The regulations in question also indicate that the effluent limitations established could be varied for an individual discharger in an NPDES permit upon a showing "that factors relating to the equipment or facilities involved, the processes applied or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines...." 39 Fed. Reg. 9634; 45 C.F.R. § 415.212. In addition, defendants assert (and the regulations note) that the factors in question are analysed in a "Development Document."

In view of the aforementioned conclusion that sections 301(b) and 304(b) intend that the Administrator will publish effluent limitations for classes and categories of point sources, the court is of the opinion that the approach taken by the Administrator in specifying factors is in accord with section 304(b). In this regard it must be noted that the factors required to be specified under section 304(b) were not intended to exist in a vacuum. Rather, both sections 304(b) (1) (B) and 304(b) (2) (B) respectively require such factors in reference to "the assessment of best practicable

control technology currently available to comply with subsection (b) (1) of section 301" and "the best measures and practices available to comply with subsection (b) (2) of section 301". Thus the statute appears to contemplate the incorporation of such factors in the effluent limitations established under section 301, which was apparently done in this case. Accordingly, the court believes that any challenge to the Administrator's consideration of various factors or the weight given to each, like the challenge to the actual numerical limitations, is in essence a challenge to the Administrator's action in promulgating effluent limitations under section 301 and must be pursued under section 509(b) (1) (E) in the Court of Appeals.

The court further is of the opinion that section 509(b) is consistent with the above construction of the Act. It is reasonable to assume that by providing original judicial review in the Courts of Appeals of effluent limitations under section 509(b) along with strict time limitations and prohibitions on review by way of criminal or other civil proceedings, Congress sought to establish expeditious and consistent application of limitations.⁷ However, by plaintiffs' construction of the Act, actual effluent limitations would always be individualized for dischargers in NPDES permits, thus limiting the broad precedential effect of any judicial decision approving or rejecting any such limitation. Furthermore, if plaintiffs could challenge section 304(b) guidelines in the district court and section 301(b) limitations in the Courts of Appeal, this would create duplicitous litigation because of the close interrelationship between these sections and the fact that the administrative record in each suit would be virtually identical. In addition, any successful challenge to guidelines in the district court would affect the limitations which could only be challenged in the Courts of Appeal and would thus hinder the goal of prompt judicial review.

The legislative history of the Act is generally consistent with the stated conclusions concerning the relationship between sections 301, 304 and 402 and the Administrator's authority to establish the effluent limitations in issue. Both the House Report accompanying H.R. 11896 and the Senate Report accompanying S. 2770 indicate that the Administrator is to establish specific effluent limitations for subcategories of point sources. Thus the House Report stated:

"As required in section 304(b)(1)(A), the Administrator, by regulations, is to identify the degree of effluent reduction attainable by the application of the best practicable control technology currently available for classes and categories of point sources. By this the Committee expects that the Administrator will concentrate on, but not be limited to, those categories of point sources enumerated in section 306(b)(1)(A) and any which the Administrator might add to that list. The Committee expects that the identification will be in objective terms and will set out actual performance levels for the classes and categories of point sources rather than prescribing specific control techniques, processes or equipment." H. Rep. No. 92-911, 92d. Cong., 2d Sess., 107 (1972), reprinted in Senate Committee on Public Works, Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess., at 794 (1973) (hereinafter "Legislative History"). (emphasis added).

The Senate Report similarly indicates that effluent limitations will be established by regulations, and in addition indicates that the defendants' approach in incorporating factors into such limitations is consistent with the statutory scheme.

"It is the Committee's intention that pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by January 1, 1976. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the

age of the plants, their size and unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case however, should any plant be allowed to discharge more pollutants than is defined by that base level." S. Rep. No. 92-414, 92d Cong., 1st Sess. p. 50; Legislative History at 1468. (emphasis added).

Plaintiffs argue that the reference to the Administrator establishing a "range of discharge levels" supports their construction of the Act. However, by creating narrow subcategories of point sources subject to different limitations, the Administrator has in effect created a range of discharge levels for various categories of point sources--in this case the category being inorganic chemicals manufacturing. In any case, the determination herein challenged set the limitation of "no discharge of process waste water" for two types of sulfuric acid plants, indicating that in the Administrator's opinion a range of numbers was inappropriate. Whether the substance of this decision was correct is, as noted above, to be challenged under section 509(b)(1)(E) in the Court of Appeals.

In the Conference Report on S. 2770 the following was stated with respect to section 304(b):

"In determining the 'best available technology' for a particular category or class of point sources, the Administrator is directed to consider the cost of achieving effluent reduction. The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of application of an effluent limitation to an individual point source within such a category

Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

"The Conferees have provided, however, a mechanism for individual point source-by-source consideration in section 301(c). That section provides that the Administrator may modify any effluent limitation based on 'best available technology' to be achieved by July 1, 1983, with respect to any point source, upon a showing by the owner or operator of such point source that an effluent limitation so modified will represent the maximum use of technology within the economic capability of the operator and will result in reasonable further progress toward the goal of the elimination of the discharge of pollutants." 118 Cong. Rec. S. 16874 (daily ed., Oct. 4, 1972; Legislative History at 172. (emphasis added)).

This quotation appears to be basically consistent with defendants' interpretation of the Act. Specifically it supports the defendants' construction that section 304(b) factors may be utilized to create subcategories subject to uniform, specific effluent limitations and refutes plaintiffs' contention that such factors are to have an independent status for the purpose of establishing discharge levels for individual plants.

4.

Plaintiffs have raised a final contention concerning the promulgation of the regulations in question which is a concomitant to their other allegations based on their construction of the statute. They argue that in issuing the regulations for inorganic chemicals, the Administrator failed to adhere to the notice and opportunity-to-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. There is apparently no dispute that notice of proposed rulemaking was published in the Federal Register on August 6, 1973 (38 Fed. Reg. 21202) and October 11, 1973 (38 Fed. Reg. 28174) and extensive comments were received from the public, including the plaintiffs. The final regulations issued on March 12, 1974 summarized the major comments received since October 11 notice of proposed rulemaking.

The plaintiffs now contend however that they approached the proposed regulations on the assumption that such regulations would be flexible "guidelines" issued under section 304(b) and not actual effluent limitations to be mechanically applied to all plants in a given subcategory. Thus they argue that by promulgating actual effluent limitations, the Administrator rendered ineffective the notice and public participation requirements of the APA.

Although the record before the court tends to belie plaintiffs' allegations of surprise and prejudice, the court does not now decide this claim. Rather, the court is of the opinion that in view of its construction of the Act, supra, review of this procedural claim should also proceed in the Court of Appeals. Section 509(b) (1) (E) provides for jurisdiction in the Court of Appeals to review "the Administrator's action" in "promulgating any effluent limitation or other limitation under section 301." This jurisdictional section is unqualified, and the court perceives no reason why review of the adequacy of notice and public participation regarding regulations which establish effluent limitations, should not proceed in the same manner as a suit challenging the substantive action of the Administrator in setting particular limitations.

To summarize, the court concludes that the regulations herein challenged are effluent limitations established by the Administrator pursuant to section 301(b) and 304(b); and that review of both the substance of such limitations and the procedures utilized in establishing the same is exclusively in the Court of Appeals pursuant to section 509(b) (1) (E). Accordingly, for the reasons stated defendants' motion to dismiss this suit for lack of subject matter jurisdiction is hereby granted.

11-11-74

Arthur J. G...
11-11-74

DATED: This 27 day of September, 1974.

Thomas L. ...
Chief U. S. District Judge (B-19)



FOOTNOTES

1. As a basis for jurisdiction to review what they consider to be section 304(b) "guidelines" plaintiffs also cite 28 U.S.C. §§ 1331, 1332, 1337 and 1651; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
2. The Administrator's approach was explained in the regulations as follows:

The approach taken in developing effluent limitations guidelines and standards of performance for the inorganic chemicals manufacturing industry was to examine all variables and segment the industry into workable subcategories consistent with these variations. Twenty-two subcategories have been established based on the chemical product manufactured. In cases where two dissimilar processes are used to manufacture the same product separate limitations have been established within the subcategory. Thus, ranges are provided for, as are other factors, by segmenting the inorganic chemicals manufacturing point source category into discrete subcategories, each with its own limitation. 39 Fed. Reg. 9612 (March 12, 1973).

3. Plaintiffs cite National Resources Defense Council v. Train, 6 E.R.C. 1033 (D.D.C. 1973) in support of their construction of the Act. That case involved a citizen's suit under section 505(a) of the Act to compel the Administrator to publish effluent limitation guidelines after expiration of the time period established by the Act. However, that case did not consider the issue of statutory construction now presented.
4. Section 306(b) provides that the Administrator shall publish regulations "establishing Federal standards of performance for new sources" within a category of sources. Plaintiffs point out that section 509(b)(1)(A) specifically provides for review of these "standards of performance." Section 306(c) authorizes the states to develop a procedure for applying and enforcing standards of performance for new sources located within the state which may then be approved by the Administrator. Plaintiffs contend that the implementation of these standards of performance would occur in permit proceedings which would be subject to approval by the Administrator in a manner similar to section 301(b) effluent limitations.
5. Section 302(a) authorizes the Administrator to "establish" "water quality" related "effluent limitations" when he finds that
"discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b) (2) (the technology-based limitations to be achieved by 1983), would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies...."

6. These pertain to the procedural requirements of a state-operated permit program.

7. There is very little legislative history relative to section 509(b). The bill as originally passed by the House provided for judicial review in the district courts whereas the Senate bill provided for review of certain administrative actions in the Court of Appeals for the District of Columbia and others in the Courts of Appeal for the appropriate circuit. H.R. 11896, 92d Cong., 2d Sess. § 509(b) (1972); S. 2770, 92d Cong., 1st Sess. § 509(b).

ADDENDUM C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PAPER INSTITUTE,

Plaintiff,

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,

and

JOHN R. QUARLES, as Deputy Administrator,
Environmental Protection Agency,

Defendants.

Civil Action No. 74-814

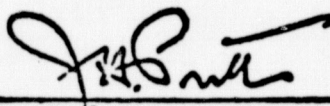
FILED

SEP 20 1974

JAMES E. DAVEY, Clerk

ORDER

The Motion to Dismiss filed by the defendants in this action is GRANTED, and the action is hereby DISMISSED, on the ground that the regulations challenged by the plaintiff in this suit are effluent limitations which, pursuant to Section 509 of the Federal Water Pollution Control Act Amendments of 1972, are subject to review only in United States Courts of Appeals.



Judge

18 Sept 74
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PAPER INSTITUTE

Plaintiff

v.

RUSSELL TRAIN, et al.

Defendants

Civil Action No. ⁷⁴⁻⁸¹⁴~~1703-73~~

FILED

SEP 20 1974

JAMES E. DAVEY, Clerk

MEMORANDUM OPINION

Plaintiff brought this action to set aside certain regulations setting forth water pollution effluent limitations guidelines and standards of performance for the pulp, paper and paperboard industries. These regulations were published pursuant to the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA" or "the Act"); Pub.L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (October 18, 1972)^{1/}

The precise issue is whether this Court has jurisdiction to review the regulations in question. Plaintiff contends that the challenged regulations are reviewable in this Court pursuant to the Administrative Procedure Act ("the APA"), 5 U.S.C. 555 et seq. Defendants maintain that the regulations are effluent limitations issued pursuant to § 301 of the Act, 33 U.S.C. § 1311.

^{1/} Regulations under challenge were promulgated by EPA at 40 C.F.R. §§ 430.10 through 430.56, 39 Fed.Reg. 18742 (May 29, 1974) and at 40 C.F.R. §§ 401.10 through 401.12, 39 Fed.Reg. 4537 (February 4, 1974) insofar as they are applicable to 40 C.F.R. §§ 430.10 through 430.56 and are therefore reviewable only by a Court of Appeals, pursuant to § 509(b)(1) of the Act, 33 U.S.C. § 1369.

Plaintiff's argument appears to be that the regulations in question are guidelines issued pursuant to § 304(b) of the Act, 33 U.S.C. § 1314(b) or that, if not guidelines, are void limitations promulgated erroneously in the stead of guidelines. In either event, plaintiff claims these regulations are reviewable in this Court under the provisions of the APA (Section 10(a)). Assuming arguendo that the regulations are guidelines only, or guidelines divisible from limitations for purposes of review, we hold that this Court does not have jurisdiction to review.

The FWPCA at § 304(b) provides for the promulgation of guidelines as an aid to the establishment of effluent limitations standards of performance for existing point sources, such limitations to be promulgated for use in the permit issuance mechanism to be put in effect no later than July 1, 1977. See 33 U.S.C. §§ 1311 and 1314(b). Since guidelines are only an aid in establishing effluent limitations and since limitations, not guidelines, comprise the standards of performance for the issuance of permits, plaintiff cannot be heard to complain that it is "adversely affected or aggrieved" by guidelines, the criteria of Section 10(a) of the APA. If these regulations are limitations, which this Court holds they in fact are, § 509 of the FWPCA provides for review by a United States Court of Appeals and not by a United States District Court. We therefore lack subject matter jurisdiction.

As to whether review of these regulations might be had in this Court as well as the Court of Appeals -- the law is clear

that "When Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irreparable by the statutorily prescribed method of review. . . ."

Nader v. Volpe, 151 U.S. App. D.C. 90, 95, 466 F.2d 261, 266 (1972). Accordingly, plaintiff's complaint is dismissed for the jurisdictional reason already set forth. An order consistent with the foregoing has been entered this date.


John H. Pratt
United States District Judge

September 18, 1974

ADDENDUM D

The tabulation of actions outside of Section 509 includes:

(1) Other EPA actions under Section 304. Section 304 is entitled "Information and Guidelines." Not one of the promulgations by EPA is covered by Section 509. Among them are --

(a) Section 304(a). EPA must establish the water quality criteria on which State water quality standards under Section 303 are based. State water quality standards are the alternative to technology for effluent limitations under Section 301(b)(1)(C) and 302.

(b) Section 304(c). EPA must publish information on the means of reducing effluent discharges for the purpose of meeting the new source standards of performance under Section 306. Standards for new plants are covered under Section 509(b), but technological benchmarks for new source standards are not. Section 304(c) serves a function somewhat similar to Section 304(b)'s identification of effluent reductions and the factors to be assessed in determining effluent limitations based on best practicable and best available technology.

(c) Section 304(d). EPA must publish information on "effluent reductions attainable" through the application of secondary treatment by public sewer systems. Secondary treatment is the technological basis for public sewer system "effluent

limitations" under Section 301(b)(1)(B). EPA also must publish information on alternative waste management techniques meeting the criteria of best practicable waste treatment technology. Best practicable technology is the basis for the Section 301(b)(2) standard for public sewers. Section 304(d) is not mentioned in Section 509.

(d) Section 304(e). EPA must publish "(1) guidelines for identifying the nature and extent of nonpoint sources of pollutants and (2) processes, procedures, and methods to control pollution from" agricultural, construction, subsurface-disposal, and other "nonpoint" sources. Such guidelines are not academic studies for use by the States in their discretion. Control of non-point sources is a mandatory part of State plans for area-wide management. Section 208(b)(2)(F) to (I) and (K), 33 U.S.C. §1288 (b)(2)(F) to (I) and (K). Area-wide waste management programs were considered to be among the most important of the 1972 Act. (See H.R. Rep. No. 92-911, 92d Cong., 2d Sess., at 72, 95 (1972).) No discharge permit may be issued contrary to an area-wide plan. (Section 208(e), 33 U.S.C. §1288(e).) Grants for public sewer systems may not be issued except as consistent with an area-wide plan. (Section 208(d).) No less than the technological effluent limitations under Section 301(b), area-wide waste management plans are a key to the Congress' program for clean water and to discharge permits for public sewer systems and industrial sources.

(e) Section 304(f). EPA is required to promulgate pretreatment standards for existing sources. (Section 307(b).) It also must promulgate pretreatment standards for new sources. (Section 307(c).) Both, through the 1973 amendments to the Act, are covered by Section 509(b). But EPA has other obligations with respect to the quality of industrial effluent prior to its introduction into a public sewer system. Under Section 304(f), EPA must publish "guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works." Significantly, these guidelines are for the purpose of "assisting the States in carrying out programs under Section 402" by establishing conditions of NPDES permits for public sewer systems consistent with the Act and the guidelines are to "designate the category or categories of treatment works to which the guidelines apply." There is no suggestion that the provisions of Section 509 apply to the pretreatment guidelines of Section 304(f).

(f) Section 304(g). EPA is required to "promulgate guidelines establishing test procedures for analysis of pollutants." These guidelines are applied in connection with permit applications, are applied as a part of reporting requirements in conditions of issued permits, and are used in enforcement actions.

(g) Section 304(h). EPA must "promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the establishment from owners and operators of point sources" and "promulgate guidelines establishing minimum procedural and other elements of any State program under Section 402." EPA's approval or disapproval of a particular State program is covered by Section 509; the guidelines for State programs are not.

(2) Regulations and Guidelines Governing the Issuance of Permits--

(a) Ocean Discharge Criteria (Section 403). The Act requires EPA to "promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans." Section 403(c)(1), 33 U.S.C. §1343(c)(1). The substantive requirement of salt water protection which these standards implement is parallel and of importance equal to the technological requirements of Section 301(b). Permits under Section 402 into the waters covered by the guidelines may not be issued "except in compliance with such guidelines." Section 403(a), 33 U.S.C. §1343(a).

(b) Guidelines for Disposal of Dredged or Fill Material (Section 404). Authority to issue permits for disposal of dredged or fill intended into navigable water resides with the Corps of Engineers. The designation of disposal sites in such permits must be from "application of guidelines" established by EPA "in con-

junction with" the Corps. Section 404 guidelines for permits are not under Section 509.

(c) Regulations on Disposal of Sewage Sludge (Section 405).

An EPA permit must be obtained for the disposal in navigable waters from public treatment systems. Section 405(a), 33 U.S.C. §1345(a). Such permits are to be based on EPA "regulations governing the disposal of sewage sludge." Section 405(b), 33 U.S.C. §1345(b).

(3) Other Guidelines and Regulations. Not all EPA guidelines and regulations provide bases for permits, but many in addition to those in Section 304 have an important regulatory impact.

(a) User Charge Guidelines (Section 204(b)(2)). Assessment of user charges from industrial sewers is a requirement for construction grants and NPDES for public sewer systems. Sections 204(b)(1), 33 U.S.C. §1284(b)(1); Section 402(b)(9), 33 U.S.C. §1342(b)(9) "Guidelines" issued by EPA govern such charges. Section 204(b)(2), 33 U.S.C. §1284(b)(2).

(b) Guidelines and Regulations for Issuance of Construction Grants (Sections 201(g)(4), 205(a), and 212(2)(c)). Upgrading of public sewage treatment by infusion of Federal funds is a critical aspect of the 1972 Act. Many important standards and conditions for Federal grants and construction are to be established by EPA

regulations and guidelines. Sections 201(g)(4), 33 U.S.C. §1281 (g)(4); 205(a), 33 U.S.C. §1285(a); 212(2)(C), 33 U.S.C. §1292 (2)(c). Neither these regulations and guidelines nor EPA issuance (or refusal to issue) construction grants are within the scope of Section 509.

(c) Aquaculture Guidelines (Section 318). EPA is authorized to permit the discharge of pollutants from aquaculture projects. Section 318(a), 33 U.S.C. §1328(a). To implement that authority, EPA must "by regulation * * * establish any procedures and guidelines [the Administrator] deems necessary." Section 318(a), 33 U.S.C. §1328(a).

(4) Major Regulatory Actions. Further demonstration of the limited scope of Section 509 lies in the fact that it does not cover a large number of important EPA regulatory actions--

(a) Area-Wide Waste Management Plans (Section 208). In addition to the guidelines noted above for the control of non-point sources of pollution in area-wide waste management, the 1972 Act gives EPA authority to issue guidelines and requires approval of various elements of this basic program. Section 208 (a)(1) and (7), (b)(1) and (3), and (c)(2), 33 U.S.C. §1288 (a)(1) and (7), (b)(1) and (3), and (c)(2).

(b) Water Quality Standards (Section 303). State-adopted water quality standards are subject to approval by EPA and, if not approved, such standards must be promulgated by EPA. Similarly, State plans for allocating allowable waste loads among discharges must be presented to EPA with EPA required to promulgate a substitute if it determines that the State allocation does not meet the requirements of the Act. Section 303, 33 U.S.C. §1313. The water quality standards and the allocation implement the requirements of Sections 301(b)(1)(C) and 302 for water-quality based effluent limitations.

(c) Spills of Oil and Hazardous Materials (Section 311). Section 311 authorizes substantial fines and penalties for spills of oil and hazardous materials. Section 311(b)(2)(B) and (b)(5) and (6), as amended, 33 U.S.C. §1321(b)(2)(B) and (b)(5) and (6). EPA is required to develop regulations governing the discharges (spills) for which liability may occur and the magnitude of the liability and requirements applicable to individual plants for prevention of such incidents. Section 311(b)(2), (3), and (4) and (j), 33 U.S.C. §1321(b)(1), (2), and (3) and (j).

ADDENDUM E.

ENVIRONMENTAL PROTECTION AGENCY MEMORANDUM
ON JUDICIAL REVIEW OF EFFLUENT LIMITATIONS GUIDELINES
February 25, 1974

MEMORANDUM

To: Acting Assistant Administrator for Air and Water Programs (AW-443)

From: Assistant Administrator for Enforcement and General Counsel (EG-329)

Subject: Judicial Review of Effluent Limitations Guidelines

The question has been raised by a number of concerned companies regarding whether petitions for judicial review of the 1983 effluent limitations (best available control technology economically achievable) which are presently being promulgated by EPA pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, as amended (the Act), 33 U.S.C. Sections 1311 and 1314, must be filed within 90 days of the date of promulgation. Section 509(b) of the Act provides that

(b) (1) Review of the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, ... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

While this will require that an effluent limitation which is not to be implemented until 1983 be judicially reviewed approximately nine years earlier, this clearly is the intent of Congress. The use of the term "any" in Section 509 (b) leaves no doubt that the 1983 limitations are to be reviewed in the same manner as the 1977 limitations and other Section 301 limitations. Therefore, any challenge to a 1983 effluent limitation must be filed within 90 days of the date of promulgation or the party will be precluded from challenging the standard. Section 509 (b) (2) provides that "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." The validity of such a restriction has been judicially approved in *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972), cert. denied, 93 S.Ct. 937 (1973) which involved the similar restriction established in Section 307 of the Clean Air Act.

While Section 509(b) (1) may present some problems in reviewing limitations based in part on estimated and projected information, the Act contains adequate provisions to avoid any harsh results. Most importantly, the 90-day limitation does not apply where the petition for review "is based solely on grounds which arose after such ninetieth day." Thus, an affected party may file for judicial review (or for additional review) at a later date where the basis for the action is facts or other information which became available after the 90 days had passed. For example, a company would be able to obtain judicial review of an effluent limitation after the 90-day period if the estimations or predictions on which it was based do not occur as expected.

Another mitigating factor is that Section 304 (b) requires the Administrator, following promulgation of regulations establishing guidelines for effluent limitations, to "... at least annually thereafter revise, if appropriate, such regulations." Moreover, Section 301 (d) provides that "Any effluent limitation required by paragraph (2) of subsection (b) of this section (the 1983 limitations) shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph." Clearly, Congress has provided for adequate continuing review of the 1983 limitations and any information relevant to determining the necessity for a revision should be surfaced. Thus, any company, or other interested party, has available to it a basis for requesting a revision of a standard where subsequent events appear to justify such revision. A failure or refusal of EPA to do so based on such information would authorize judicial review on the basis of the provision cited in the preceding paragraph. For these reasons, the 90-day requirement in Section 509 (b) does not appear to be an unreasonable limitation on judicial review of the 1983 effluent limitations.

A final factor which should be mentioned relates to the relationship between Sections 301 and 304. Section 509 (b) makes no mention of judicial review of the Section 304 (b) guidelines for effluent limitations. However, the effluent limitations guidelines which the Agency is presently issuing under Section 304 (b) are also being issued Section 301 and establish effluent limitations under Section 301. Thus, these guidelines fall within the provision in Section 509 (b) for judicial review within 90 days of "any effluent or other limitation under section 301." The effluent limitations guidelines promulgated by the Agency will implement both Section 301 and Section 304. Since it would be impossible to challenge the Section 301 limitations without challenging the Section 304 (b) guidelines, the requirements in Section 509 (b) that limitations promulgated pursuant to Section 301 be challenged in the United States Court of Appeals and within 90 days almost must be considered to include challenges to Section 304 guidelines.

/s/ Alan G. Kirk, II